

# The Presumption of Innocence and the Canadian Bill of Rights: Regina v. Appleby

Michael Mandel

*Osgoode Hall Law School of York University*

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Article

## Citation Information

Mandel, Michael. "The Presumption of Innocence and the Canadian Bill of Rights: Regina v. Appleby." *Osgoode Hall Law Journal* 10.2 (1972) : 450-486.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol10/iss2/8>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

## THE PRESUMPTION OF INNOCENCE AND THE CANADIAN BILL OF RIGHTS: REGINA V. APPLEBY

By MICHAEL MANDEL\*

In *Regina v. Appleby*,<sup>1</sup> the Supreme Court of Canada was once again seized with the question of an alleged conflict between the *Canadian Bill of Rights*<sup>2</sup> and a provision of another federal statute. The impugned provision was s. 224A(1) (a) of the *Criminal Code*,<sup>3</sup> which to be fully understood must be read in conjunction with s. 222:<sup>4</sup>

222. Everyone who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction . . .

224A. (1) In any proceeding under section 222 or 224,

(a) where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

The facts of *Appleby* were as follows: William F. Appleby was arrested when found seated in the driver's seat of a taxi in what was never doubted to be an impaired condition. The information alleged that he "while his ability to drive a motor-vehicle was impaired by alcohol or a drug did unlawfully have care and control of a motor-vehicle". Appleby testified that he had entered the driver's seat of the taxi to use the radio to summon a wrecker, rather than for the purpose of driving the taxi. Although this evidence raised a reasonable doubt in the mind of Ellis, Prov. J., as to whether or not Appleby had entered the vehicle for the purpose of driving it,<sup>5</sup> he nevertheless convicted and sentenced him to pay a fine of \$150.00, or in default of payment to be imprisoned for 21 days.

---

\*Member of the 1972 Graduating Class, Osgoode Hall Law School of York University. The writer wishes to express his indebtedness to Professor Anthony Hooper of Osgoode Hall Law School of York University for his useful comments and criticisms during the preparation of this paper.

<sup>1</sup> [1971] 3 C.C.C. (2d) 354; 16 C.R.N.S. 35; 21 D.L.R. (3d) 325.

<sup>2</sup> S.C. 1960, c. 44; now R.S.C. 1970, Appendix III.

<sup>3</sup> S.C. 1953-54, c. 51, as am. S.C. 1968-69, c. 38, s. 16; now R.S.C. 1970, c. C-34, s. 237 (1) (a).

<sup>4</sup> Now s. 234.

<sup>5</sup> It is not absolutely clear from reading the case stated by Ellis, Prov. J., whether the reasonable doubt raised by Appleby's testimony was as to his purpose in entering the vehicle or the presence of the general element of "care or control". However the former interpretation is the more likely and it seems to have been the one adopted by the Court of Appeal and the Supreme Court of Canada.

In so convicting notwithstanding the presence of a reasonable doubt, the learned trial judge relied on the decision of Munro, J., in *R v. McRae*<sup>6</sup> where it was held that in order to avoid the effect of s. 224A(1) (a) it was not sufficient for an accused to raise a reasonable doubt as to whether his purpose in entering the vehicle in question was to drive it; rather, he had to prove that such was not his purpose by a preponderance of the evidence or by a balance of probabilities. Munro, J., stated the law as follows:

... since the judgment of the Supreme Court of Canada in *Tupper v. The Queen*, [1968] 1 C.C.C. 253, 63 D.L.R. (2d) 289, [1967] S.C.R. 589, and the judgment of the British Columbia Court in *R. v. McCoolle* (1968), 65 W.W.R. 427, it is my opinion that it is now settled law in Canada that where a statute imposes an onus upon an accused person to establish or to prove an essential fact, that burden of proof is fulfilled by satisfying the obligation which rests upon the party in a civil action to prove by a preponderance of evidence or by a balance of probabilities the allegations of which proof is required by the party so asserting.<sup>7</sup>

The reference to *Tupper* was a reference to the *obiter* remarks of Judson, J., (in which Fauteux, Martland, Ritchie and Hall, JJ. concurred) to the effect that the onus placed on an accused by s. 295(1)<sup>8</sup> of the *Code* was proof "on a balance of probabilities".<sup>9</sup> In *McCoolle*, the British Columbia Court of Appeal merely applied this *dicta* as law.

At any rate, this was the basis of the ruling of the trial judge. Appleby appealed by way of stated case to the Supreme Court of British Columbia where the appeal was allowed and the conviction was quashed.<sup>10</sup> Dohm, J., was of the opinion that since the statement of Judson, J., in *Tupper* was *obiter* and since *McCoolle* and *McRae* were based on that statement, none of the three cases were binding on him. Instead he relied principally on two decisions of the British Columbia Court of Appeal, *R. v. Hartley and McCallum (No. 1)*<sup>11</sup> and *R. v. Silk*<sup>12</sup> which had held that the statutory onus placed on an accused charged with unlawful possession of drugs for the

---

<sup>6</sup> [1969] 4 C.C.C. 374; 6 C.R.N.S. 199; 68 W.W.R. 609 (B.C.).

<sup>7</sup> [1969] 4 C.C.C. 374 at 375-6.

<sup>8</sup> Now s. 309(1) which reads:

"Everyone who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years."

<sup>9</sup> The complete statement was as follows (S.C.R. at 593):

"Once possession of an instrument capable of being used for house-breaking has been shown, the burden shifts to the accused to show on a balance of probabilities that there was lawful excuse for possession of the instrument at the time and place in question".

<sup>10</sup> [1970] 1 C.C.C. (2d) 96; 12 C.R.N.S. 124; 75 W.W.R. 670.

<sup>11</sup> [1968] 2 C.C.C. 183; 63 W.W.R. 174.

<sup>12</sup> [1970] 3 C.C.C. 1; 9 C.R.N.S. 277; 71 W.W.R. 481.

purpose of trafficking under the *Narcotic Control Act*<sup>13</sup> and the *Food and Drugs Act*<sup>14</sup> respectively, to "establish", once unlawful possession had been proved, that his purpose was not to traffic, was an onus of "raising a reasonable doubt" as to whether or not his purpose was to traffic.

Of course, to say that an accused has an "onus of raising a reasonable doubt" is merely to say in another way that there is an onus on the Crown of proving guilt *beyond* a reasonable doubt. Either way the accused would be entitled to be acquitted if, when all the evidence adduced by either side is in, there is a reasonable doubt as to whether he committed the offence in question. Thus the courts which subscribed to this interpretation of the "reverse-onus clauses" in the *Narcotic Control Act* and the *Food and Drugs Act* were really saying that those provisions did not in any way affect the allocation of the "persuasive burden", — the burden of convincing the court at the end of the day of the truth of a matter — for that was still on the Crown.<sup>15</sup> What the courts in *Hartley and McCallum* and *Silk* and their predecessors had done, in effect, was to interpret those provisions as having the effect of shifting the "evidential burden" only.<sup>16</sup>

The phrase "evidential burden", when used in the context of a burden on the Crown, is generally meant to describe the Crown's familiar burden of bringing forth enough evidence to make out a *prima facie* case of guilt. How much evidence the Crown must bring forward in order to discharge this burden is a matter that does not admit of a very precise formulation; but this much at least can be said: the Crown must adduce enough evidence so that a properly instructed jury, acting reasonably, might convict the accused, i.e. might find that each element of the offence had been proved beyond a reasonable doubt.<sup>17</sup> If the Crown fails to discharge this burden, the accused is entitled to succeed on a motion for a directed verdict of acquittal, sometimes

---

<sup>13</sup> S.C. 1960-61, c. 35 (now R.S.C. 1970 c. N-1) s. 8 which provides:

"8. In any prosecution for a violation of subsection 4(2) [possession for the purpose of trafficking], if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3 [simple possession], and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence as charged but he shall be convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly."

<sup>14</sup> S.C. 1952-53, c. 38, s. 33 (now R.S.C. 1970, c. F-27 s. 35), enacted S.C. 1960-61, c. 37, s. 1 which provides:

"33(1) In any prosecution for a violation of subsection (2), of section 33 [possession for the purpose of trafficking], if the accused does not plead guilty,

the trial shall proceed as if the issue to be tried is whether the accused was in possession of a controlled drug.

(2) If, pursuant to subsection (1) the court finds that the accused was not in possession of a controlled drug, he shall be acquitted, but if the court finds that the accused was in possession of a controlled drug, he shall be given an opportunity of establishing

(a) that he acquired the controlled drug from a person authorized under the regulations to sell or deal with controlled drugs; or

(b) that he was not in possession of the controlled drug for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to the contrary.

(3) If the accused establishes the facts set forth in paragraph (a) or (b) of subsection (2) he shall be acquitted of the offence as charged; and if the accused fails to so establish he shall be convicted of the offence as charged and sentenced accordingly. [ss. (2) and (3) later rep. & sub. 1968-69, c. 41, s. 8].

<sup>15</sup> I am adopting here the shorthand phrases: (1) "persuasive burden", and (2) "evidential burden", to refer respectively to what have variously been called: (1) "the burden of persuasion", "the risk of non-persuasion of the jury", "the major burden" and "the primary burden"; and (2) "the burden of adducing evidence", "the burden of going forward", "the minor burden" and "the secondary burden". In this regard I follow Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (1961), 871-882. For a good examination of these two aspects of "burden of proof" in Canadian law, see W. H. Jarvis, *Primary and Secondary Burdens of Proof in Criminal Law* (1963), 5 Crim. L.Q. 425.

<sup>16</sup> See especially *R. v. Sharpe*, [1961] O.W.N. 261; 131 C.C.C. 75; 35 C.R. 375 (C.A.), where it was said concerning ss. 4(4) and 17 of the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201 (re-enacted 1953-54, c. 38, ss. 3 and 8), the former section being substantially the same as s. 8 of the *Narcotic Control Act* quoted *supra*, note 13 and the latter section providing a presumption of possession from occupation of a place where a drug had been found (*per* Morden, J.A., at 377 C.R.):

"The burden resting upon the Crown in a criminal case of proving the accused guilty beyond a reasonable doubt is a matter of substantive law and never shifts from the Crown. In contrast to this, the secondary burden — that of adducing evidence — may shift in the course of a trial depending upon the evidence adduced . . .

The statutory burdens or presumptions raised by s. 4(4) and s. 17 of the *Opium and Narcotic Drug Act* assist the prosecution by shifting the secondary burden, the burden of adducing evidence, to the accused after evidence is adduced by the prosecution of the basic facts which raise the presumption under s. 17 and a finding of possession is made under s. 4(4) . . . After all the evidence has been heard, if in the mind of the court a reasonable doubt of guilt exists, the accused must be acquitted."

<sup>17</sup> See *R. v. Haughey*, [1972] 1 W.W.R. 60 (B.C.Co. Ct.) and cases therein; also *R. v. Robichaud* (1950), 98 C.C.C. 86 (N.B.C.A.). Lord Parker, C.J., has stated the proper considerations on a submission of "no case" to be the following (Practice Direction, [1962] 1 W.L.R. 227):

"A submission that there is no case to answer may properly be made and upheld; (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

called a motion for a "non-suit".<sup>18</sup> The obvious rationale for this mechanism is that when we say that the Crown has failed to make out a *prima facie* case, i.e. failed to discharge its evidential burden, we are really saying that no jury, if it were acting legally and reasonably, would convict the accused. Thus, in such a situation we do not take the chance of leaving the issue of guilt or innocence to the jury; or where there is no jury, we do not trouble the accused for an answer (the English say he has "no case to answer"). Rather, we acquit forthwith.

By the common law, the Crown has an evidential burden to discharge with respect to each essential ingredient or element of the offence charged, save for certain "negative averments" which can be said to be "peculiarly within the knowledge of the accused."<sup>19</sup> As to these "negative averments" and as to "defences", the evidential burden is on the accused. As to these matters, he too has a burden of making out a *prima facie* case of sorts (though it is rarely spoken of in this manner). For instance, to discharge his evidential burden with respect to any defence, the accused must adduce enough evidence so that a properly instructed jury, acting reasonably, might find in his favour, i.e. might be left with a reasonable doubt as to whether or not he had the defence.<sup>20</sup> The practical effect of a failure by the accused to discharge any evidential burden that he bears with respect to an issue, is that the issue will not be left with the jury, i.e. the judge will give no instruction on it. In effect, the issue is thus foreclosed against him. Of course, if the accused is successful in discharging his evidential burden with respect to any defence (save for the defence of insanity, with which we shall deal later), the issue must go to the jury and it becomes the Crown's duty to disprove the presence of the defence beyond a reasonable doubt.<sup>21</sup>

It will be seen, then, that whether we are speaking of the Crown's or the accused's evidential burden, we are essentially speaking of a matter of jury control.<sup>22</sup> In order to get past the judge to the jury, the party with the

---

<sup>18</sup> Of course, if the Crown succeeds in making out a *prima facie* case, the factfinder is authorized but not required to convict, even in the absence of any evidence from the accused's side. In the words of Ritchie, J., in *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221 at 228:

"I do not think that any authority is needed for the proposition that, when the Crown has proved a *prima facie* case and no evidence is given on behalf of the accused, the jury *may* convict, but I know of no authority to the effect that the trier of fact, is *required* to convict under such circumstances."

<sup>19</sup> These are dealt with *infra*, notes 148 to 159.

<sup>20</sup> See *Mancini v. D.P.P.*, [1942] A.C. 1; *R. v. Lobell*, [1957] 1 Q.B. 547 (C.C.A.). The usual thing that is said is that the accused must adduce "some evidence" or "some credible evidence". Of course, the evidence need not come from the accused himself; it may come from direct or cross examination of the Crown's witnesses or the accused's witnesses.

<sup>21</sup> See *Latour v. The King*, [1951] S.C.R. 19.

<sup>22</sup> Of course where the judge is sitting alone, though the test of what constitutes a *prima facie* case is the same as where there is a jury, it is somewhat awkward to speak of a judge controlling the reasonableness of his own decision (although control may be exercised by appellate review; thus we may speak generally of "factfinder" control). Where the judge is sitting alone the more important rationale of the directed verdict is the "anti-harassment" rationale, viz. that nobody should be troubled to answer a criminal charge unless there is a "case" against him.

evidential burden on an issue must adduce enough evidence so that a decision in his favour on the issue might reasonably be found. This is the first "hurdle". The second hurdle is, of course, to obtain a favourable decision on the issue at the end of the case as a matter of "persuasion".<sup>23</sup>

When looked at in this context, decisions such as those in *Hartley and McCallum* and *Silk* become somewhat difficult to understand. Take, for example, a charge of possession of a controlled drug for the purpose of trafficking as was the case in *Silk*. The statute provides that when possession is proved, the accused shall be convicted of possession for the purpose of trafficking unless he "establishes" that such was not his purpose.<sup>24</sup> The Court holds, though, that "establishes" means "raises a reasonable doubt" and thus the Crown must prove *beyond* a reasonable doubt that the accused's purpose was to traffic. This, of course, would have been the Crown's duty without the presence of such a provision. However, adds the Court, the evidential burden is shifted to the accused. Yet it is never suggested that if he fails to discharge this burden the issue will be foreclosed against him, as it would be, for example, if he failed to adduce any evidence on a plea of self-defence. On the contrary, it is held that at the end of the case, if the Crown has not proved the whole offence, i.e. "possession" and "purpose" beyond a reasonable doubt, the accused is entitled to be acquitted. This would also be the situation if the provision was not present. What, then, were the courts saying was the effect of this provision? They said simply, that it relieved the Crown of making out the traditional *prima facie* case on the issue of "purpose", protecting it from a directed verdict of acquittal and ensuring that once possession was proved, the case would go to the jury.<sup>25</sup> However, though the Crown is relieved to this extent of its evidential burden, that burden is not strictly shifted to the accused, except in the sense that as in any other case where the Crown has made out a *prima facie* case which must go to the factfinder,

<sup>23</sup> See Cross, *Evidence* 3rd ed. (1967) at 69.

In *Jayasena v. The Queen*, [1970] A.C. 618, the Privy Council distinguished the "evidential burden" from the burden of proof proper (what we have called the "persuasive burden") and described the nature of the former burden as follows (*per* Lord Devlin at 624):

"Their Lordships do not understand what is meant by the phrase 'evidential burden of proof.' They understand, of course, that in trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof, whether described as legal or evidential or by any other adjective when it can be discharged by the production of evidence that falls short of proof."

<sup>24</sup> The *Food and Drugs Act*, s. 33, *supra*, note 14.

<sup>25</sup> "The section, once possession has been found, simply relieves the Crown of the onus of adducing evidence to prove that the accused had possession for the purpose of trafficking and to that extent the section softens the burden which otherwise rests upon the Crown." *per* Branca, J.A., in *Silk*, [1970] 3 C.C.C. 1 at 22.

it may be tactically to the advantage of the accused to adduce some counter-vailing evidence.<sup>26</sup> But, of course, he is strictly entitled to rely on any deficiencies in the Crown's case.<sup>27</sup>

The strangest aspect of this interpretation, however, is that if the Crown, through its evidence and apart from any assistance provided by the statute, has not made out a traditional *prima facie* case on the issue of "purpose", then by definition no properly instructed factfinder, acting reasonably, would convict. Yet this would be the only occasion where the statutory provision would be of any use to the Crown, for if there was a *prima facie* case on the evidence, that alone would get the question to the factfinder apart from any statutory provision. Thus for the provision, as interpreted, to have any effect whatsoever, the factfinder would have to act unreasonably, i.e. illegally.<sup>28</sup> This very curious line of statutory interpretation appears to have been based on the English case of *R. v. Ward*<sup>29</sup> which was later repudiated in *R. v. Patterson*.<sup>30</sup>

This rather long digression, which will be useful later when we come to consider the effect of the *Canadian Bill of Rights*, on statutory provisions such as this, leads us back to the decision of Dohm, J., in *Appleby*. Following the line of interpretation we have just examined, he expressed his opinion thus:

In my respectful view the degree or standard of proof to rebut a statutory presumption in a criminal case is not that the defence has to prove the same on

<sup>26</sup> See Cross, *supra*, note 23 at 73-74.

In *Silk*, Nemetz, J.A., quoted the following statement from Glanville Williams, *Proof of Guilt* 3rd ed. (1963) at 185-6 as stating the effect of the provision being considered ([1970] 3 C.C.C. 1 at 29):

"Where the law shifts the evidential burden to the accused, the prosecution need not give any evidence, or need give only slight evidence, on that issue, in the sense that they are not liable on that issue to be met with a submission of "no case to answer," even though they have failed to give the evidence usually required. This means that the accused must, for his own safety, make some answer. But the shifting of the evidential burden does not necessarily mean that the burden of persuasion or burden of proof proper passes to the defendant. When all the evidence is in, the jury will be directed that the burden of proving all the issues remains with the Crown, so that if they are not satisfied on any of the issues they must find for the defendant. All that the shifting of the evidential burden does at the final stage of the case is to allow the jury to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."

<sup>27</sup> "... if the prisoner by *argument* or evidence or cross-examination of the Crown's witnesses establishes a reasonable doubt as to whether he had possession of the narcotic for the purpose of trafficking, he must be acquitted of that particular offence, ..." (emphasis added): *Hartley and McCallum*, [1968] 2 C.C.C. 183 at 187 (*per* Davey, C.J.B.C.).

<sup>28</sup> A useful discussion of these cases is found in Levy, *Reverse Onus Clauses in Canadian Criminal Law — An Overview* (1970), 35 Sask. L. Rev. 40, at 47-50.

<sup>29</sup> [1915] 3 K.B. 696; 11 Cr. App. R. 245 (C.A.).

<sup>30</sup> [1962] 2 Q.B. 429; 46 Cr. App. R. 106 (C.A.).

See as to the effect of *Ward* in Canada, Schultz, *The Statutory Onus of Proof in Criminal Cases* (1967), Can. Bar. J. 492, cited with approval in *R. v. McRae* (1969), 6 C.R.N.S. 199 at 201. At p. 501 of his article, Mr. Justice Schultz writes: "Courts in Canada have been misled by *Ward*. But *Ward* is dead! It is time, in Canada, the death is recognized and the body buried."



a balance of probabilities, but the defence need only raise the lesser standard of a reasonable doubt.<sup>31</sup>

An appeal by the Crown to the British Columbia Court of Appeal was dismissed<sup>32</sup> and the Crown appealed to the Supreme Court of Canada. There the full court in two separate opinions unanimously allowed the appeal and restored the conviction entered at trial.

Ritchie, J., speaking for himself, Fauteux, C.J.C., Abbott, Martland, Judson, Spence and Pigeon, JJ., held that there was no difference between the words "establishes" and "proves" when used in the context of imposing a burden on an accused<sup>33</sup> and that when a statute declared that it was for the accused to do either of these, then the accused could only do it with proof "by a preponderance of evidence or by a balance of probabilities and . . . it is not enough for an accused merely to raise a reasonable doubt".<sup>34</sup> Further, Ritchie, J., adopted the passage we have already quoted from the *McRae*<sup>35</sup> case as "an accurate statement of the law",<sup>36</sup> recognizing that much of the contrary opinion had been based on the repudiated *Ward* case<sup>37</sup> and also that the "reasonable doubt" construction contended for "makes the statutory presumption ineffective and the section meaningless".<sup>38</sup> In his separate opinion, Laskin, J., (Hall, J., concurring) agreed that the construction placed by Ritchie, J., on s. 224A(1)(a) was the correct one, though he went no further than that on this aspect of the appeal.<sup>39</sup>

For the reasons given above with respect to the interpretations given by the British Columbia Court of Appeal to the presumptions under the *Narcotic Control Act* and the *Food and Drugs Act*, it is submitted that this aspect of the Court's decision is unimpeachable.

However, there was another argument advanced on behalf of Appleby in the Supreme Court of Canada, one that had not been argued in any of the courts below, namely that the interpretation ultimately given s. 224A(1)(a) conflicted with s. 2(f) of the *Canadian Bill of Rights* (hereinafter sometimes referred to as "the *Bill*"). This argument, too, was unanimously rejected by the Court and it is with this aspect of the decision that the present writer takes issue.

It will do well here to hearken back to the words of Ritchie, J., speaking for the majority of the Court in the landmark decision of *The Queen v.*

---

<sup>31</sup> 75 W.W.R. 670 at 672.

<sup>32</sup> [1971] 2 C.C.C. (2d) 98; 13 C.R.N.S. 171; [1971] 2 W.W.R. 219.

<sup>33</sup> [1971] 3 C.C.C. (2d) 354 at 357.

<sup>34</sup> *Id.*, at 360. The decisions relied on were basically those dealing with the burden of proof on an accused pleading insanity as a defence: *Clark v. The King* (1921), 61 S.C.R. 608; *Smythe v. The King*, [1941] S.C.R. 17.

<sup>35</sup> *Supra*, note 7.

<sup>36</sup> [1971] 3 C.C.C. (2d) 354 at 359.

<sup>37</sup> *Id.*, at 359.

<sup>38</sup> *Id.*, at 360.

<sup>39</sup> *Id.*, at 364. It should be noted that Laskin and Hall J.J., concurred only "in result".

*Drybones*<sup>40</sup> where a provision of the *Indian Act*<sup>41</sup> was declared inoperative as abrogating "the right of the individual to equality before the law and the protection of the law".<sup>42</sup> Concerning the effect of s. 2 of the *Bill of Rights*, Ritchie, J., said:

It seems to me that a more realistic meaning must be given to the words in question and they afford, in my view, the clearest indication that s.2 is intended to mean and does mean that if a law of Canada cannot be "sensibly construed and applied" so that it does not abrogate, abridge or infringe one of the rights and freedoms recognized and declared by the Bill, then such law is inoperative "unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*".<sup>43</sup>

Section 2(f) of the *Bill of Rights* provides as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights* be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; ...

What counsel for Appleby argued was that any interpretation of s. 224A(1) (a) of the Code which imposed a greater persuasive burden<sup>44</sup> on an accused than that of raising a reasonable doubt deprived him of "the right to be presumed innocent until proved guilty according to law" and that, consequently, according to the rule in *Drybones* the section had to be interpreted as imposing no greater burden than that. Since in support of this argument counsel for Appleby did "little more" than invoke the opinions of Tysoe and Nemetz, J.J.A., in the *Silk* case<sup>45</sup> concerning the effect of the same section of the *Bill* on s. 33 of the *Food and Drugs Act*,<sup>46</sup> it will serve us well to refer back to that case once more.

Although the main ground in *Silk* for holding that s. 33(2) (b) of the *Food and Drugs Act*, which required an accused charged with possession of a controlled drug for the purpose of trafficking to "establish", once possession had been proved, that his purpose was not to traffic, imposed no greater burden than that of "raising a reasonable doubt" was the curious exercise in statutory interpretation earlier discussed,<sup>47</sup> Tysoe, J.A. (Davey, C.J.B.C., and Branca, J.A., concurring; Bull, J.A. expressing no opinion on this aspect

---

<sup>40</sup> [1970] 3 C.C.C. 355; 9 D.L.R. (3d) 473; [1970] S.C.R. 282.

<sup>41</sup> R.S.C. 1952, c. 149, s. 94(b); now R.S.C. 1970, c. 1-6, s. 95(b).

<sup>42</sup> The *Canadian Bill of Rights*, *supra*, note 2, s. 1(b).

<sup>43</sup> [1970] S.C.R. 282 at 294.

<sup>44</sup> There is no express or implied reference to the "evidential burden", either in the respondent's factum or in the opinion of Ritchie, J., though it is referred to in the opinion of Laskin, J., *infra*, note 121.

<sup>45</sup> [1971] 3 C.C.C. (2d) 354 at 362; see also respondent's factum pp. 5-7.

<sup>46</sup> The section is quoted *supra*, note 14.

<sup>47</sup> *Supra*, text accompanying notes 11 to 30.

of the appeal) found "support" for his view in s. 2(f) of the *Canadian Bill of Rights*.<sup>48</sup> He felt that to interpret the reverse onus clause as imposing a burden on an accused of proof on a balance of probabilities that he did not intend to traffic in the drugs he possessed "would make a mockery of the presumption of innocence"<sup>49</sup> and he reasoned as follows:

The presumption of innocence that is made in criminal cases really does no more than give the benefit of any reasonable doubt to the accused, but it is an important feature of our law and it is so cogent that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty. See Roscoe, *Criminal Evidence*, 16th ed., p. 20.

If Parliament has imposed on an accused the onus of establishing by placing beyond dispute or by a preponderance of evidence or on a balance of probabilities that he has not had possession for the purpose of trafficking, it has deprived him of the benefit of a reasonable doubt as to the purpose of his possession, and it has in effect imposed upon him the burden of disproving a positive averment of an integral part of the offence charged against him. It is difficult for me to believe that Parliament intended to do this. Had Parliament said that one accused of this particular offence or, for that matter, any other offence, has the onus of proving he is not guilty, I venture to think that no one would disagree with the proposition that it had deprived the accused of the right to be presumed innocent until proved guilty according to law. It is my view that the same result follows if Parliament imposes on an accused the burden of disproving a positive averment of an important integral part of the offence of having possession for the purpose of trafficking.

Section 2 of the *Canadian Bill of Rights* says that the *Food and Drugs Act* shall not be construed or applied so as to deprive a person charged with an offence thereunder of the right to be presumed innocent until proved guilty according to law. The spirit and intent of s. 2(f) is such that in my opinion s. 33 of the *Food and Drugs Act* must not be construed or applied so as to require the respondent to prove that he did not have possession for the purpose of trafficking. Section 33 can be given effect to if it is interpreted to mean that there is an onus on the respondent to raise a reasonable doubt as to the purpose of his possession and that the Crown carries the usual burden of proof of the respondent's guilt — possession and purpose — beyond a reasonable doubt. I so interpret it.<sup>50</sup>

The emphasis by Tysoe, J.A., on the fact that "purpose" was "a positive averment of an integral part of the offence charged against him", was principally a way of distinguishing the *Tupper* case, where the matter which the accused was charged with "proving" had been expressed *negatively* in the section defining the offence,<sup>51</sup> and thereby avoiding the effect of the *dicta* of Judson, J., to which we referred earlier.<sup>52</sup> It was also a way of circumvent-

<sup>48</sup> It might be interesting to note that the opinions in *Silk* were delivered on November 19, 1969, one day before the opinions of the Supreme Court of Canada in *Drybones* were delivered.

<sup>49</sup> [1970] 3 C.C.C. 1 at 13.

<sup>50</sup> *Id.*, at 13-14.

<sup>51</sup> s. 295(1) (now 309(1)) of the Criminal Code quoted *supra*, note 8. "Negative averments" are dealt with *infra*, notes 148 to 159.

<sup>52</sup> *Supra*, note 9.

ing the decision of the Ontario Court of Appeal in *R. v. Guertin*<sup>53</sup> where it was held that on a charge under s. 80 of the *Criminal Code*<sup>54</sup> it was for the accused to prove<sup>55</sup> "lawful excuse" as a "defence" and that this didn't deprive him of his "right to be presumed innocent until proved guilty *according to law*", the implication being that "according to law" in s. 2(f) of the *Canadian Bill of Rights* meant "according to whatever Parliament enacts from time to time as law". It was with a discussion of *Guertin* that Tysoe, J.A., concluded his reasoning in *Silk*:

On this aspect of the case the Crown relied on *R. v. Guertin*, 130 C.C.C. 403, [1961] O.W.N. 134, 34 C.R. 345. I do not regard that case as comparable to the case before this Court. It was concerned with the provisions of Code, s. 80 which deals with possession or the making of explosives without lawful excuse, the proof of which lies upon the accused. Stress was laid by Porter, C.J.O., on the expression "according to law" in s. 2(f) of the Canadian Bill of Rights. I wish to say only, and I do so with great respect, that if a statute were to declare that a person charged with an offence shall be deemed to be guilty unless he proves his innocence and he fails to prove it, I doubt if it could properly be said that he has been "proved guilty according to law". The key word is "proved".

It is one thing to impose an onus on an accused to disprove a negative averment and quite another to require him to disprove a positive averment of an integral part of an offence. Clearly, when Parliament enacted s. 2(f) of the *Canadian Bill of Rights*, it intended to assure that so fundamental and well-established a principle of our law as to the presumption of innocence should be preserved. In my opinion the section provides protection against the possibility of the enactment of a statute declaring that a person shall be deemed guilty of a criminal offence unless he establishes his innocence. I think it also has reference and application to a statute which purports to require an accused to disprove by a preponderance of evidence or on a balance of probabilities a positive averment of an integral part of the offence charged against him, and I so interpret the section.<sup>56</sup>

In relying, then, on the reasoning of Tysoe, J.A., in *Silk*, counsel for Appleby was saying to the Supreme Court of Canada that since "care and control" was an essential element of the offence with which Appleby was charged, it was a violation of the presumption of innocence to "deem" it proved on the proof of certain facts which would not of themselves (i.e. without the assistance of s. 224A(1)(a)) necessarily amount in law to "care and control", and

---

<sup>53</sup> [1961] O.W.N. 134; 130 C.C.C. 403; 34 C.R. 345.

<sup>54</sup> S. 80 provides:

"Every one who without lawful excuse, the proof of which lies upon him,

(a) makes or has in his possession or under his care or control an explosive substance that he does not make or does not have in his possession or under his care or control for a lawful purpose, or

(b) has in his possession a bomb, grenade or other explosive weapon, is guilty of an indictable offence and is liable to imprisonment for five years."

<sup>55</sup> It is not clear from his reasons whether or not Porter, C.J.O., interpreted the onus of "proof" in s. 80 as meaning proof on a balance of probabilities or merely the raising of a reasonable doubt. The former is more likely and, at any rate, after *Tupper*, *McCoole*, and *Appleby*, it is clearly the proper interpretation.

<sup>56</sup> [1970] 3 C.C.C. 1 at 14-15.

to require the accused, in order that he might avoid this "deeming", to *disprove*, on a balance of probabilities, an intention to drive.<sup>57</sup>

There was a separate concurring opinion rendered on the *Canadian Bill of Rights* issue in the *Silk* case by Nemetz, J.A. Its importance derives from the fact that it provided the core of the *ratio* of the opinion of Ritchie, J., in *Appleby*, Nemetz, J.A., expressed his view of s. 2(f) thus:

There is no doubt, in my mind, that the *Bill of Rights* in s.2(f) gives express statutory approval to Lord Sankey's memorable words in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462. The golden thread, as he described it, which runs through the web of English criminal law was clearly identified by Chief Justice Martin in *Lee Fong Shee* [60 C.C.C. 73; 47 B.C.R. 205, [1933] 3 W.W.R. 204] and by Chief Justice Davey in *R. v. Hartley and McCallum (No. 1)*, [1968] 2 C.C.C. 183, 63 W.W.R. 174. In my respectful view, s. 2(f) does nothing more than restate the common law by providing that the primordial burden of proving the guilt of an accused beyond a reasonable doubt is always on the Crown.<sup>58</sup>

It was this passage that Ritchie, J., seized upon in *Appleby*. His sole reason (and thus the sole reason of seven members of the Court) for rejecting the contention of the respondent concerning the effect of s.2(f) of the *Canadian Bill of Rights* on the presumption in s. 224A(1) (a) of the *Code* was this: *if* the former provision was to be taken as having codified what Viscount Sankey, L.C., said in *Woolmington*, then a provision which threw the burden of disproof of an element of an offence on the accused would not conflict with the *Bill* — because Viscount Sankey, L.C., expressed the reason-

<sup>57</sup> There is somewhat of a difficulty involved in the meaning given by Ritchie, J., to the combined effect of ss. 222 and 224A(1) (a). At [1971] 3 C.C.C. (2d) 354 at 364 he says:

"In giving effect to the statutory presumption created by s. 224A(1) (a) in relation to a charge under s. 222, the position is that if it is proved that the accused was impaired by alcohol or a drug, and it is further proved that he was, at the relevant time, occupying the seat ordinarily occupied by the driver, he shall be deemed to have had the care or control of the vehicle, but the accused has the opportunity of rebutting this presumption if he 'establishes' by the balance of probabilities 'that he did not enter or mount the vehicle for the purpose of setting it in motion'.

If the accused cannot so satisfy the court then the statutory presumption prevails and he is guilty of an offence under s. 222, but, if he is able to provide the requisite evidence, *he must be acquitted.*" (Emphasis added)

What Ritchie, J., seems to be saying then, is that an intention to drive is an essential element of the offence, for if the accused disproves it he is *entitled* to be acquitted. Another way of stating this would be to say that proof of a lack of intention to drive is a defence to the charge. This should be contrasted with *R. v. Donald*, [1971] W.W.R. 538; 14 C.R.N.S. 17 (B.C.C.A.) where it was held that notwithstanding clear proof of a lack of intention to drive by the accused, he could still be convicted of the offence because neither was intention to drive an essential ingredient of the offence nor was lack thereof a defence. Section 224A(1) (a) was there characterized as a procedural "assist" to the Crown in proving "care and control". If the Crown could prove it some other way it was entitled, at its option, to do so. *Donald* was cited in the Court of Appeal in *Appleby* (1970), 13 C.R.N.S. 171 at 176 but it is not mentioned in the reasons for judgment of the Supreme Court of Canada.

<sup>58</sup> [1970] 3 C.C.C. 1 at 29.

able doubt rule he enunciated in *Woolmington* as being subject to any statutory exception. To quote Ritchie, J.:

If s. 2(f) of the *Canadian Bill of Rights* is to be taken as giving statutory approval to what Viscount Sankey, L.C., said in the *Woolmington* case, it seems to me to be proper to quote the whole of the sentence to which Nemetz, J.A., refers. What Viscount Sankey, L.C., actually said [at p. 481], after having dealt with the defence of insanity was:

Throughout the web of English Criminal Law one golden thread is always to be seen; that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.<sup>59</sup>

The emphasis is that of Ritchie, J. Further on in his opinion, Ritchie, J., said:

It seems to me, therefore, that if the *Woolmington* case is to be accepted, the words "presumed innocent until proved guilty according to law" as they appear in s. 2(f) of the *Canadian Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.<sup>60</sup>

As this was the sum and substance of the reasons given by Ritchie, J., for deciding against the contention advanced on behalf of Appleby, the proposition that begs to be tested is whether or not it can be said that Parliament, in enacting s. 2(f) of the *Canadian Bill of Rights*, intended no more than a codification of those "memorable words" which Viscount Sankey, L.C., spoke in *Woolmington*.

The facts of *Woolmington* were as follows. The accused was charged with murdering his wife. He testified that she was indeed killed by a rifle which he was handling at the time, but that it had happened quite by accident. The trial judge's charge to the jury contained the following sentence:

Once it is shown to a jury that somebody died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified.<sup>61</sup>

He had also instructed them:

... if the Crown satisfied you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident.<sup>62</sup>

The jury convicted Woolmington of murder and the Court of Criminal Appeal affirmed. The House of Lords, however, quashed the conviction on the ground of misdirection. Speaking for the House, Viscount Sankey, L.C.,

---

<sup>59</sup> [1971] C.C.C. (2d) 354 at 363.

<sup>60</sup> *Id.*, at 363-4.

<sup>61</sup> Quoted in *Woolmington v. Director of Public Prosecutions* [1935] A.C. 462 472-73.

<sup>62</sup> *Id.*, at 482.

while admitting that there was "apparent authority for the law as laid down by the learned judge",<sup>63</sup> said that the direction given was nevertheless "not the law of England".<sup>64</sup> After distinguishing the defence of insanity as "quite exceptional",<sup>65</sup> the Lord Chancellor made the statement from which Ritchie, J., quoted in *Appleby*.<sup>66</sup> As a whole, it read as follows:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner *is part of the common law of England* and no attempt to whittle it down can be entertained.<sup>67</sup> (emphasis added)

Since Viscount Sankey, L.C., was thus concerned only with an interpretation<sup>68</sup> and application of the common law, then (if we are to be strict) the part about "any statutory exception" was pure *obiter* and forms no part of the "rule" in *Woolmington*. For "the common law is quite a separate thing from the law as enacted in statutes by Parliament from time to time. The distinction is elemental, but if authority be needed, one might refer to the words of Sir Matthew Hale who wrote of the *lex scripta* and the *lex non scripta*. The former was comprised of "statutes or acts of parliament, which in their original formulation are reduced into writing, and are so preserved in their original style and words wherein they were first made". But it was the latter which was "the common law properly so called". It was made up of laws which

... are grown into use, and have acquired their binding power and the force of laws by a long and immemorial usage, and by the strength of custom and reception in this kingdom.<sup>69</sup>

So even if Parliament is to be taken to have codified the rule in *Woolmington* by s. 2(f) of the *Canadian Bill of Rights*, since the rule in *Woolmington* is merely a statement of the common law with respect to the burden of proof in criminal cases, which was and is that an accused must be acquitted if there is a reasonable doubt as to his guilt, then s. 224A(1) (a) of the *Code* con-

<sup>63</sup> *Id.*, at 473.

<sup>64</sup> *Id.*, at 482.

<sup>65</sup> *Id.*, at 475: "*McNaughton's* case [(1843) 4 St. Tr. (N.S.) 847] stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *McNaughton's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence."

<sup>66</sup> *Supra*, note 59.

<sup>67</sup> [1935] A.C. 462 at 481-2.

<sup>68</sup> Perhaps a more apt word than "interpretation" is "creation", for as the Privy Council has recently noted in *Jayasena*, *supra*, note 23, the decision of the House of Lords in *Woolmington* actually marked a *change* in the common law with respect to the question before it. This, added the Privy Council, was quite within the spirit of the "malleable" common law: [1970] A.C. 618 at 625.

<sup>69</sup> Hale, *A History of the Common Law* 4th ed. (1792), 23. See also I Blackstone, *Commentaries*, 63.

flicts with s. 2(f) of the *Bill*. This is because it provides for conviction on a charge under s. 222 even though an essential ingredient ("care or control") may not have been proved beyond a reasonable doubt.<sup>70</sup>

But perhaps we are being a little too technical. After all, it was not the rule in *Woolmington* that Ritchie, J., assumed was codified in s. 2(f) but rather what Viscount Sankey, L.C., said. And what he said was definitely that the rule was subject to any statutory exception. The real question,<sup>71</sup> then, is whether Parliament is to be taken to have intended the phrase "the right to be presumed innocent until proved guilty according to law" in s. 2(f) of the *Bill* to mean "the right to be presumed innocent until proved guilty according to whatever Parliament enacts from time to time as law (even if what is enacted as law imposes a duty on an accused to prove, to some extent or even completely, his innocence)."

The preliminary objection to ascribing to Parliament the identification in s. 2(f) of the *Bill*, of "according to law" with "according to whatever Parliament enacts from time to time as law", is, of course, that it is tantamount to reducing the "right to be presumed innocent" to a quite harmless and useless platitude.<sup>72</sup> Apart from the desirability or undesirability of doing

---

<sup>70</sup> Or, if we are to take the interpretation Ritchie, J., seems to have given s. 224A(1) (a), *supra*, note 57, the conflict lies in providing for conviction where the essential ingredient of "having entered the vehicle for the purposes of setting it in motion" may not have been proved beyond a reasonable doubt. For an accused is only entitled to acquittal if he proves the absence of this ingredient on a balance of probabilities.

<sup>71</sup> I say "the real question" because I do not suppose Ritchie, J., to be saying that Parliament in enacting s. 2(b) of the *Bill* was thinking specifically of Viscount Sankey's words in *Woolmington*, especially since the passage quoted by Ritchie, J. makes no mention of "the right to be presumed innocent until proven guilty according to law". In fact the closest to this Viscount Sankey, L.C., comes in *Woolmington* is one passing use of the phrase "presumption of innocence" in reference to a passage from *Taylor on Evidence* 11th ed. (1920), ss. 113: [1935] A.C. 462 at 480.

It is important to note here the context within which Viscount Sankey, Q.C., made his somewhat cautious statement. His was a jurisdiction in which the legislature had not, and has not since, sought to impose any limitations on its statute making power, and thus the complete statement of any point of law would need to include a reference to previous and possible future legislative abrogations. Our jurisdiction is quite different in its possession of a *Drybones*-interpreted Bill of Rights.

<sup>72</sup> We have long had just such a platitude in Canadian criminal law. S. 5(1) (a) of the *Criminal Code* provides:

"5(1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof;

(a) a person shall be deemed not to be guilty of that offence until he is convicted thereof, ..."

The roots of this section are found in *An Act Respecting Procedure in Criminal Cases and Other Matters relating to Criminal Law* (1869), 32-33 Vict. c. 29, s. 1(3) which provided in part:

"Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefore, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act; ..."

The former section took over from the latter in S.C. 1953-54, c. 51; the importance of both sections is indicated by the fact that they haven't found their way into any reported cases. S. 5(1) (a) is referred to in the "Practice Note" to Guertin (1961), 34 C.R. 345.



that from the standpoint of criminal law policy, as a matter of statutory construction it would seem to be unsound. For to make any of the rights and freedoms in the *Canadian Bill of Rights* "subject to any statutory exception" is to divest them of any purpose, pre-*Drybones* (as mere "canons on construction")<sup>73</sup> or post-*Drybones* (as standards by which other statutory provisions might also be rendered inoperative), and it is trite law that the provisions of a statute are to be construed with reference to the purpose of the whole.<sup>74</sup>

However, there are more cogent reasons for believing that Parliament, in enacting s. 2(f), and indeed many of the substantive provisions of the *Bill of Rights* was, to put it in geographical terms, not looking east but rather south.

What is now s. 2(f) of the *Canadian Bill of Rights* was not included when Bill C-60, *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*,<sup>75</sup> received its first reading in the House of Commons. It was only added after the Special Committee proceedings which followed the second reading of the Bill (as Bill C-79).<sup>76</sup> In describing this addition (which included the addition of both the "presumption of innocence" and the "reasonable bail" clauses) and a change in the wording of s. 2(b), to the House of Commons, the Chairman of the Special Committee (Mr. Spencer) said:

We made three additions to clause 2, and again I emphasize these are not matters which were not included in the general enumeration of rights and freedoms in clause 1. Clause 2, after all, is the interpretative clause, and it is in that clause that an attempt is made to spell out in particular those things to which the courts must have regard when it comes to the interpretation or the application of the laws of the Parliament of Canada.<sup>77</sup>

<sup>73</sup> See *R. v. Gonzales* (1962), 32 D.L.R. (2d) 290 (B.C.C.A.) per Davey, J.A., at 292. Note further that, appearing as it does in s. 2 instead of s. 1, we cannot even ascribe to it the "declaratory" functions which the rights and freedoms of s. 1 might be said to have at least in part.

<sup>74</sup> See *Canada Sugar Refining Co. v. R.*, [1898] A.C. 735, 741 where Lord Davey said:

"Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

See also W. F. Craies, *Craies on Statute Law* 6th ed. (1963) at 98-100; C. Odgers, *The Construction of Deeds and Statutes* 5th ed. (1967) at 237-9; P. Maxwell, *The Interpretation of Statutes* 11th ed. (1962) at 66 where the author writes:

"Even where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it . . .

If . . . there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may be given to it; . . ."

<sup>75</sup> See (1959), 37 Can. Bar Rev. 1 for a reproduction of Bill C-60.

<sup>76</sup> See Tarnapolsky, *The Canadian Bill of Rights* (1966) at 14-17 for the legislative history of the Bill.

<sup>77</sup> *Hansard*, 1960 at 7405. I am not suggesting, when I quote from *Hansard* that such evidence of Parliament's intention is admissible in court. The law is clearly the other way: *A.-G. Can. v. Reader's Digest Assn. (Canada) Ltd.*, [1961] S.C.R. 775. These are cogent reasons but they are not legal reasons for interpreting the *Bill* in the way I am suggesting.

After discussing the change in s. 2(b), the Chairman proceeded to s. 2(f):

The other two changes in this clause were made in subclause (f), and again I say that this was only for the purpose of spelling out in greater detail, without becoming too verbose, those rights and freedoms declared in the first clause of the bill.<sup>78</sup>

The *Bill of Rights* as ultimately enacted reflects this attitude of the chairman in its use of the words "and in particular" in the general part of s. 2 to introduce the specific subclauses which follow.<sup>79</sup>

Even the most cursory reading of s. 1 will reveal that the only conceivable "general" of which s. 2(f) could have been intended as a "particular" was s. 1(a) which reads:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; ...

The phrase "due process of law", though long absent from English jurisprudence by the time Parliament enacted the *Canadian Bill of Rights*<sup>80</sup> actually finds its origin, it is generally agreed, in a statute of Edward III<sup>81</sup> in the following context:

That no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by due Process of the Law.

The phrase appears to have been intended as merely a convertible restatement of the phrase "the law of the land", as found in the famous Chapter 39 of *Magna Carta* which reads:

No free man shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him, except by the lawful judgment of his peers and by the law of the land.

The matter is by no means free from doubt, but the better scholarship seems to have it, that as used in *Magna Carta* (and thus as restated by the phrase "due process of the law" 139 years later) "the law of the land" referred not to any old mode of trial then extant and less still to any law proclaimed by the King no matter how pernicious; rather it referred to "a traditional body of immemorial custom, 'found' by successive generations

---

<sup>78</sup> *Id.*

<sup>79</sup> This was somewhat more clearly expressed in the *Bill* as first introduced in Parliament where the words used were the more common "and without limiting the generality of the foregoing." The substitution was probably made in response to the general objections to the original Bill that it was too "legalistic", "dry" and "uninspiring"; see, for example, Mr. Pearson's speech in *Hansard*, 1960 at 5664.

<sup>80</sup> See Tarnapolsky, *supra*, note 76 at 149; Rand, *Except By Due Process of Law* (1961), 2 Osgoode Hall L.J. 171 at 174.

<sup>81</sup> 28 Edw. III, c. 3(1354).

See Mott, *Due Process of Law* (1926) at 4; Corwin, *The Constitution and What It Means Today*, 12th ed. (1958) at 217.

of suitors in the courts, running back in unbroken continuity to an origin beyond the Conquest and possibly far beyond it", or "the ancient custom of the realm, 'the law of the land' in a real sense."<sup>82</sup>

Is this not the *lex non scripta* of Hale<sup>83</sup> — the common law properly so called? And is not the common law with respect to the burden of proof in criminal cases, save where the defence of insanity is raised, that which Viscount Sankey, L.C., laid down in *Woolmington*, namely proof beyond a reasonable doubt of every fact necessary to constitute guilt?

But surely to reach seven and one half centuries into English legal history for the meaning in 1960 of the phrase "due process of law" in the context of a Bill of Rights enacted in *Canada* is to torture reality. As Mr. Justice Rand has written:

Not in the history of either Great Britain or Canada has there been such a formal and specific recognition, declaration and qualification as appears in this enactment. The phrase is placed for interpretation against the background of specific liberties; the only analogy we have, and it is an exact one, is its appearance in the setting of American constitutionalism, both federal and state.<sup>84</sup>

Mr. Justice Rand was, of course, referring to the Fifth and Fourteenth Amendments to the American Constitution. The Fifth Amendment<sup>85</sup> contains the following words: "No person shall be . . . deprived of life, liberty, or property without the process of law". And in the Fourteenth Amendment<sup>86</sup> there are the words: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law". The similarity between these provisions and subsection (a) of section 1 of the *Canadian Bill of Rights*, if a matter of coincidence, is startling.

But it would be absurd to suppose that it is coincidental. The real facts are otherwise. Much debate and evidence in the proceedings of The Special Committee on Bill C-79 centered around the phrase "by due process of law" and it was strongly urged that the phrase should be scrapped and "according to law" substituted for it. But the inclusion of the former phrase was deliberate.<sup>87</sup> As Justice Minister Fulton explained:

It is true that we cannot say that our courts would follow all the American jurisprudence; but our courts could not fail to take account of the fact that these words are in the American constitution, that they have been given judicial interpretation.<sup>88</sup>

Those are the real facts. The legal facts are that when the *Canadian Bill of Rights* was enacted, there was not a drop of Anglo-Canadian jurisprudence

---

<sup>82</sup> McIlwain, *Due Process of Law in Magna Carta* (1914), 14 Col. Law Rev. 26, 44-51. See also, on the meaning of *lex terrae*, Holdsworth, *A History of English Law* 4th ed. (1927), Vol. 1 at 60-62; Jenks, *A Short History of English Law* 6th ed. (1949) at 17-19; Hogue, *Origins of the Common Law* (1966) at 5-6.

<sup>83</sup> *Supra*, note 69.

<sup>84</sup> Rand, *supra*, note 80 at 174.

<sup>85</sup> (1791), applicable to Congress.

<sup>86</sup> (1868), applicable to the States.

<sup>87</sup> See Tarnapolsky, *supra*, note 76 at 158.

<sup>88</sup> *Hansard* 1960 at 7431.

as to the meaning of "due process of law" as contrasted with an ocean of American jurisprudence.

Probably the most litigated clause in the American Constitution, the due process clause has many areas of uncertainty in its application to American criminal procedure. However, the question which faced the Supreme Court of Canada in *Appleby* is not one of them. Had Congress or any of the State legislatures enacted s. 224A(1) (a) of the *Criminal Code*, the Supreme Court of the United States would undoubtedly have struck it down as violative of due process.

In order to understand the American case law in this area, and its relevance to Canadian law, a short note on classification is necessary. S.224A(1) (a) of the *Criminal Code* is a species of provision known as a "statutory presumption".<sup>89</sup> A presumption, as we shall use the term, whether statutory or otherwise, is a rule of law which gives to a finding of fact or group of facts (the "basic fact") the effect of shortening inquiry into the presence of another fact or group of facts (the "presumed fact") by declaring that they shall be "presumed" or "deemed" to be present, once the basic fact is found to be present.<sup>90</sup>

Presumptions may be either irrebuttable or rebuttable.<sup>91</sup> If irrebuttable, the legal effect of a finding of the basic fact is to completely foreclose inquiry into the presence or absence of the presumed fact, which is "conclusively deemed" to be present. If rebuttable, then notwithstanding a finding of the presence of the basic fact, the presence of the presumed fact may still be disputed, may be "rebutted". The irrebuttable presumption being more in the nature of a "definition" where the basic fact *equals* the presumed fact *in every case*, it is not really relevant to a discussion of the allocation of "persuasive" and "evidential" burdens in a criminal case. Thus we shall concentrate only on rebuttable presumptions.<sup>92</sup>

Rebuttable presumptions are either "persuasive" or "evidential",<sup>93</sup> when used in a criminal law context, according to whether they relieve the prose-

---

<sup>89</sup> The writing on this area of the law is voluminous. The classic statement is found in Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 313-352; see also Wigmore, *Evidence* 3rd ed. (1940), Volume 9 at 286-293. Unfortunately as the courts have not remained completely faithful to these learned authors, we cannot either; thus the following classification departs seriously in its terminology from these two works.

<sup>90</sup> Presumptions such as the "presumption of innocence" and the "presumption of sanity", not depending on the preliminary finding of any basic fact are not included in this classification. Thayer submits that it is "perverse" and "inaccurate" to call "these maxims and ground principles" presumptions: *id.*, at 335.

<sup>91</sup> Both Thayer, *supra*, note 84 and Wigmore, *supra*, note 84 deny that irrebuttable presumptions are strictly "presumptions" at all. I use the phrase only because it is a matter of common parlance and convenience.

<sup>92</sup> For examples of what I have called "irrebuttable presumptions", see ss. 3, 180(2), and 308 of the *Criminal Code*.

<sup>93</sup> The phraseology is once again that of Glanville Williams, *supra*, note 15 at 882-886; in McCormick, *Handbook of the Law of Evidence* (1954), at 639 the terms "mandatory" and "permissive" are used to the same effect, but placing more emphasis on the effect of the presumption on the decision of the trier of fact.

tion, once the basic fact is found, of its persuasive or evidential burden with respect to the presumed fact. Thus a persuasive presumption, when not rebutted, in effect *proves* the presumed fact for the prosecution in the sense that the trier of fact is *required* to treat it as proved beyond a reasonable doubt, i.e. to "find" it. An evidential presumption on the other hand, if not rebutted, merely operates as *prima facie* evidence of the presumed fact, protecting the prosecution from a directed verdict of acquittal on the ground of "no case to meet" and *authorizing* the trier of fact to find the presence of the presumed fact, but in no sense *requiring* such a finding.

Thus, for example, the statutory presumption at issue in *Appleby*, as it *required* a finding of "care or control" ("he shall be deemed"), once it had been proved that the accused was in the driver's seat at the relevant time (the basic fact), unless he established that he did not enter for the purpose of driving (i.e. unless he rebutted the presumption), was a persuasive presumption, because it *proved* "care or control" for the Crown.<sup>94</sup>

The effect of a rebuttable presumption which has not been rebutted is a distinct matter from the question of what is necessary to rebut it (render it inoperative) once raised. Thus a persuasive presumption might cast either a persuasive burden (as in *Appleby*, "proof on a balance of probabilities") or an evidential burden on an accused in order to rebut it.<sup>95</sup>

Both persuasive and evidential presumptions, though obviously helpful to the Crown, are potentially very dangerous devices, for two distinct but related reasons. The danger lies in inaccurate factfinding. A persuasive presumption forces the trier of fact, once the basic fact is found, to treat the presumed fact as having been proved beyond a reasonable doubt — even if he is not to this extent convinced. And an evidential presumption, in making out a *prima facie* case for the Crown in those cases where, on the evidence, none would otherwise exist, allows an issue to be left with the factfinder, even though no factfinder properly instructed and acting reasonably could find for the Crown on it.<sup>96</sup>

---

<sup>94</sup> An example of an evidential presumption was s. 293(2) of the *Code* before it was amended by S.C. 1968-69 C. 38 s. 92(2). It provided that on a charge of entering or being in a dwelling house with intent to commit an indictable offence, evidence that the accused entered or was in a dwelling house without lawful excuse was "*prima facie* evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein". In *Austin v. The Queen*, [1969] 1 C.C.C. 97, C.R.N.S. 388 (S.C.C.) it was held that this did not relieve the Crown of the duty of proving "intent" beyond a reasonable doubt.

The amendment, however, substituted for "*prima facie* evidence" the words "in the absence of any evidence to the contrary, proof" and this may have changed the presumption from an evidential to a persuasive one; see *R. v. Marshall*, [1970] 1 C.C.C. (2d) 505; 13 C.R.N.S. 4 (B.C.C.A.).

<sup>95</sup> In *Marshall, id.*, where the Court seemed to interpret the presumption as being persuasive (though the point was not in issue), it was held rebutted by the discharge of an evidential burden only.

<sup>96</sup> It will be remembered that the only time the prosecution will be "non-suited" on the ground that it has not made out a *prima facie* case is where the evidence is such that no jury properly instructed and acting reasonably could convict; see earlier discussion *supra* in text accompanying notes 15-30.

It is with the latter type of danger, the one involved in the use of evidential presumptions, that the American cases have largely been concerned. The current test by which the constitutionality (as regards due process) of such presumptions is decided in the United States is found in the opinion of the Supreme Court in *Leary v. United States*.<sup>97</sup> The charge against Leary was brought under 21 U.S.C. s. 176a ss. 2(h) which provided (so far as is relevant): "... whoever, knowingly ... facilitates the transportation ... of ... marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law ... shall be imprisoned ...". The subsection went on to provide:

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

In declaring this last part unconstitutional as violative of due process, the Court (in an opinion delivered by Mr. Justice Harlan) enunciated the following test:

... a criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to follow from the proved fact on which it is made to depend.<sup>98</sup>

By "at least", the Court meant that it did not feel it necessary to decide for the purposes of the instant case whether a more stringent test which it termed "the criminal 'reasonable doubt' standard" had also to be satisfied because the presumption in *Leary* failed the less stringent "more likely than not" test.<sup>99</sup>

The approach taken by the Court to these presumptions is empirical. That is, it examines the available data and literature in order to see whether the presumed fact is more likely than not to follow the proved fact "in common experience". Thus in *Leary* where two facts necessary to constitute guilt (viz. foreign origin and knowledge thereof) were "presumed" by the statute from the mere possession of marijuana, the Court restricted its inquiry to the question of whether it could be said "with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana",<sup>100</sup> assuming without deciding that the "foreign origin" presumption was permissible. The Court found in the negative and struck down the presumption.

The cardinal thing to be remembered about *Leary*, of course, is that the presumption considered there was merely an "evidential" one, and as such

---

<sup>97</sup> 395 U.S. 6 (1968).

<sup>98</sup> *Id.*, at 36.

<sup>99</sup> *Id.*, at 36, no. 64. Similarly in *Turner v. United States*, 396 U.S. 398 (1969), the Court refrained from deciding this question as it felt that the presumption there satisfied both tests.

<sup>100</sup> 395 U.S. 6 (1968) at 52.

"In order thus to determine the constitutionality of the 'knowledge inference, one must have direct or circumstantial data regarding the beliefs of marijuana users generally about the source of the drug they consume." *Id.*, at 37-38.

benefitted the prosecution only in that it relieved it from adducing evidence directly on the presumed fact, thereby protecting it from a non-suit, and, perhaps more importantly, it obtained from the trial judge an instruction to an impressionable jury that in the absence of a satisfactory explanation, proof of possession was, in the Government's opinion, sufficient evidence upon which to convict. In cases such as *Leary*, it is distaste for a statute that "permits conviction on insufficient proof,"<sup>101</sup> that actuates the Court to strike down the presumptions.

Thus, though it has not yet had to decide the precise question, the Supreme Court of the United States seems to have "established an identity between constitutional and judicial standards" of proof;<sup>102</sup> and when the Court refers to a "criminal reasonable doubt" standard it is indicating that such evidential presumptions will only be allowed to stand if the finding of the basic fact is enough to make out the traditional *prima facie* case upon which the trier of fact might reasonably find the presence of the presumed fact beyond a reasonable doubt. Such a development might well be considered inevitable as the Court comes to grips with the confusing inconsistency of leaving a question of fact with a jury when by definition (viz. by definition of a traditional *prima facie* case) no jury acting properly and legally could find against the accused on the question.

And what of "persuasive" presumptions, such as the one our own Supreme Court passed upon in *Appleby*? The U.S. Supreme Court has not yet been confronted with any such creatures; but its treatment of evidential presumptions alone should indicate that persuasive presumptions (which *require* and do not merely authorize a finding of the presumed fact once the basic fact has been found) would not stand much of a chance. But the Court has gone even further. It has stressed the evidential nature of the presumptions before it, underlining the fact that the trier of fact is not bound to give effect to them but rather is *bound* to acquit if left with a reasonable doubt as to the guilt of the accused, i.e. a reasonable doubt on anything necessary to constitute the crime charged.<sup>103</sup> And, of course, it is the precise function of the persuasive presumption that it binds the trier of fact, once the basic fact is found, to "find" the presumed fact, notwithstanding that he may not be convinced beyond a reasonable doubt of its presence.

And it is, of course, the reasonable doubt standard, reflective of the chill fear of convicting the innocent, which has been lurking behind all these decisions. In the recent case of *In re Winship*,<sup>104</sup> the U.S. Supreme Court

<sup>101</sup> *Id.*, at 37 (emphasis added).

<sup>102</sup> Comment, *The Constitutionality of Statutory Criminal Presumptions* (1966), 34 U. Chi. L. Rev. 141 at 151, cited in *Leary*, *id.*, at 36, n. 64. See also, the Court's interpretation of its holding in *United States v. Gainey*, 380 U.S. 63 (1965) in *Leary* at 35: "we sustained the *Gainey* presumption finding that it did no more than accord to the evidence, if unexplained, its natural probative force."

<sup>103</sup> See *Gainey*, *supra*, note 102 at 68-70; *Turner*, *supra*, note 99 at 406, n. 6; also *United States v. Adams*, 293 F. Supp. 776 (1968) at 783-84, cited in *Leary*, 36, n. 64.

<sup>104</sup> 397 U.S. 358 (1970). The case concerned the question of the standard of proof in juvenile delinquency cases where the juvenile is charged with a violation of the criminal law.

finally affirmed the reasonable doubt standard as a requirement of "due process":

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.<sup>105</sup>

Mr. Justice Brennan, delivering the opinion of the Court,<sup>106</sup> made the following remarks about the reasonable doubt standard and the administration of criminal justice:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.

\*\*\*\*\*

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.<sup>107</sup>

Earlier, the Court had said that the reasonable doubt standard "provides concrete substance for the presumption of innocence."<sup>108</sup> This is a fact of which those who in this country, in England and in the U.S., proudly wave the presumption of innocence like a banner of freedom are often forgetful. Yet when Sir James Fitzjames Stephen described the presumption of innocence, he did so only in terms of the prosecution's burden of proving guilt beyond a reasonable doubt.<sup>109</sup> Professor Thayer wrote of the presumption:

Very little is said about it before this century . . . In looking through the arguments of Erskine and Curran and other great lawyers famous for their defence of accused persons and through the charges of the court given to juries—in the last century and the early part of this, we shall find very little, indeed, almost nothing, about the presumption of innocence. But a great deal will be found, a very great emphasis is placed, upon the rule that a party must be proved guilty by a very great weight of evidence. That is the important thing. And I think it will be found that, in English practice, down to our time, the presumption of innocence — except as a synonym for the general principle incorporated in that total phrase which expresses the rule about a reasonable doubt, namely, that the accused must be *proved* guilty, and that beyond a reasonable doubt — plays a very small part indeed. (emphasis in original)<sup>110</sup>

<sup>105</sup> *Id.*, at 364.

<sup>106</sup> Three judges dissented but only one (Mr. Justice Black) on the question of the constitutional stature of the reasonable doubt standard.

<sup>107</sup> 397 U.S. 358 (1970) at 363-64.

<sup>108</sup> *Id.*, at 363.

<sup>109</sup> Stephen, *A Digest of the Law of Evidence* 3rd ed. (1877) at 152-53; see also Stephen, *General View of the Criminal Law of England* 2nd ed. (1890) at 183.

<sup>110</sup> Thayer, *supra*, note 84, Appendix B at 554. The reader should compare this statement with the remark of Tysoe, J.A., in *Silk, supra*, note 56, about s. 2(f) of the *Bill*, that "the key word is 'proved'".



So when the majority of the Court in *Appleby* denuded the presumption of innocence of its "reasonable doubt" support, it rendered it quite impotent. Of course s. 2(f) of the *Bill* makes no mention of the reasonable doubt standard and perhaps a "strict constructionist", literalist or mechanistic view of the wording of the section<sup>111</sup> would justify such an emphasis on the phrase "according to law". The argument from "due process", of course, could not be dismissed so easily.

Yet nowhere in the opinion of Ritchie, J., is either the phrase "due process" or s. 1(a) of the *Bill* given the slightest mention. The reason is apparent from the second paragraph of the separate concurring opinion of Laskin, J., (Hall, J., concurring) where he disclosed:

*It was not contended* that there was any problem with respect to the "due process of law" provision of s. 1(a) of the *Canadian Bill of Rights*. Certainly, it cannot be said that no rational connection exists between the fact to be deemed and the fact required to be proved: see *R. v. Sharpe*, [1961] O.W.N. 261, 35 C.R. 375, 131 C.C.C. 75.<sup>112</sup>

We shall examine the opinion of Laskin, J., in due course, but first we would do well to pause over this rather cryptic reference to "rational connection" and the *Sharpe* case.

"Rational connection" or the "rational connection test" is what might be called the precursor of the "more likely than not" test enunciated in *Leary*. It gained prominence in the case of *Tot v. United States*<sup>113</sup> where the minimum test of the constitutionality of criminal statutory presumptions was expressed as follows:

Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.<sup>114</sup>

The "comparative convenience" test (which asked whether, given the relative opportunities for knowledge between prosecutor and accused, it would be of no hardship on the accused to prove the absence of the presumed fact) which had theretofore been given some currency,<sup>115</sup> was relegated to a corollary of the rational connection test. The two important things to be noted about *Tot*, for our purposes, are firstly that the "rational connection" test has clearly been superseded by the "more likely than not test", and secondly that in *Tot*

<sup>111</sup> The relevant wording of s.2(f) is an exact duplicate of the words in Article 11(1) of the United Nations' *Universal Declaration of Human Rights* (1948): "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". (emphasis added).

Note the striking difference, for our purposes, between the wording of s.2(f) of the *Bill* and this early statement by Mr. Justice Holmes of the constitutional rule against statutory presumptions in *McFarland v. American Sugar Refining Company* 241 U.S. 79 (1915) at 86: "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

<sup>112</sup> [1971] 3 C.C.C. (2d) 354 at 365.

<sup>113</sup> 319 U.S. 463 (1943).

<sup>114</sup> *Id.*, at 467.

<sup>115</sup> See *Morrison v. California* 291 U.S. 82 (1934).

the Court, while not perfectly articulating the distinction, was dealing with what was, and what was treated as, an evidential presumption only, i.e. a presumption which *authorized* but did not *require* conviction once the basic fact was proved.

In *Sharpe*, however, the Ontario Court of Appeal was dealing with a presumption which, though apparently as held, could be *rebutted* by the discharge of an evidential burden only,<sup>116</sup> was clearly persuasive, at least on its face, in the sense that failure to rebut *required* conviction.<sup>117</sup> After holding that this did not conflict with s.2(f) of the *Bill of Rights*, Morden, J.A., made the following observation:

It is interesting to note that the Supreme Court of the United States has on many occasions held that statutory presumptions similar to those I have been considering are not a denial of due process of law guaranteed by the Fifth and Fourteenth Amendments provided that there is a rational connection in common experience between the fact proved and the ultimate fact presumed: *Adams v. New York* (1903), 192 U.S. 585; *Yee Hem v. United States* (1925), 268 U.S. 178; *Western & Atlantic Ry. v. Henderson* (1929), 279 U.S. 639; *Tot v. United States* (1943), 319 U.S. 463; and *Cooley*; *Constitutional Limitations*, 8th ed. (1927) at pp. 639-642.<sup>118</sup>

All the cases cited in this passage had dealt with presumptions that were only evidential in character, but Morden, J.A., apparently either did not feel it necessary to point out this very significant factor, or missed it altogether. The learned judge might well be forgiven this omission, however, because until the decision of the U.S. Supreme Court in *United States v. Gaine*y<sup>119</sup> in 1965, the significance of the distinction between persuasive and evidential presumptions for purposes of due process constitutionality had not been made as clear as it might have been.

However, *Gaine*y, *Leary*, and *Winship*, which together clearly spelled the doom of persuasive presumptions, and cast in severe doubt the constitutionality of evidential presumptions where the proved fact does not of itself make out the traditional *prima facie* case (by judicial standards) on the presumed fact, were all decided and reported well in advance of *Appleby*, and yet not the slightest mention of any of these cases is found in either of the opinions rendered by the Supreme Court of Canada. In fact, not one American case was cited in either the Appellant's factum (which is understandable) or the Respondent's factum (which is not so understandable).

Let us now return to the brief opinion of Laskin, J. It is a very curious opinion indeed. Laskin, J. was not as impressed with the phrase "according to law" in s.2(f) as was Ritchie, J., and he was sensitive to the very intimate connection between the presumption of innocence and the reasonable doubt standard:

I do not construe s.2(f) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s.2(f) for a federal

---

<sup>116</sup> See *supra*, note 16.

<sup>117</sup> See *supra*, note 13 and note 16.

<sup>118</sup> (1961), 35 C.R. 375 at 378.

<sup>119</sup> *Supra*, note 102.

criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s.2(f) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin v. U.S.* (1895), 156 U.S. 432 at p. 452.<sup>120</sup>

The next paragraph is a little less clear:

What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply. This does not mean that the reply must necessarily be by the accused himself. However, if he alone can make it, he is competent to do so as a witness in his own behalf; and I see nothing in this that destroys the presumption of innocence. It would be strange, indeed, if the presumption of innocence was viewed as entitling an accused to refuse to make any answer to the evidence against him without accepting the consequences in a possible finding of guilt against him. The presumption does not preclude either any statutory or nonstatutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown. Hence, I do not regard s.2(f) as addressed to a burden of adducing evidence, arising upon proof of certain facts by the Crown, even though the result of a failure to adduce it would entitle the trier of fact to find the accused guilty.<sup>121</sup>

In this paragraph two very sound points seem to be made, namely that

- (1) while an accused has the legal right to "do nothing" to prove his innocence, since the presumption of innocence may be overcome by proof of guilt beyond a reasonable doubt, it may be tactically to his advantage to "do something"; and
- (2) neither the presumption of innocence alone, nor in its more completed form, the reasonable doubt standard prevents the imposition on an accused of a burden of adducing evidence so long as at the end of the case, if the court has a reasonable doubt as to whether the accused is guilty, he is entitled to be acquitted.<sup>122</sup>

The disturbing thing about this paragraph is the way in which Laskin, J., seems to slur the distinction between the evidential burden, or the burden of adducing evidence, and the persuasive burden or the burden of proof proper.

<sup>120</sup> [1971] 3 C.C.C. (2d) 354 at 365. A note of caution with respect to the *Coffin* case. Though as authority for the constitutional stature of the presumption of innocence it is undoubted in American law, the suggestion therein that the presumption of innocence operates "as evidence" in favour of the accused has been uniformly rejected: see Thayer, *supra*, at 89, Appendix B.

<sup>121</sup> [1971] 3 C.C.C. (2d) 354 at 365.

<sup>122</sup> It is precisely to assure that acquittal will be based on only *reasonable* doubts, as opposed to merely "conjectural" doubts that an evidential burden—a burden of adducing "some credible evidence"—may be justifiably imposed. As was pointed out by Devlin, J., in *Hill v. Baxter*, [1958] 1 Q.B. 277 at 284;

"It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond reasonable doubt that the accused was at the time of the crime sober, or not sleep walking or not in a trance or blackout."

To repeat: "The presumption does not preclude either any statutory or non-statutory burden upon an accused *to adduce evidence to neutralize, or counter on a balance of probabilities*, the effect of evidence presented by the Crown." (emphasis added)

This confusion between the evidential burden and the persuasive burden prepares us for Mr. Justice Laskin's otherwise startling and somewhat terse conclusion in the next paragraph:

In my opinion, the test for the invocation of s.2(f) is whether the enactment against which it is measured calls for a finding of guilt of the accused when, at the conclusion of the case, and upon the evidence, if any, adduced by Crown and by accused, who have also satisfied any intermediate burden of adducing evidence, there is a reasonable doubt of culpability. Section 224A(1) (a) is not of this character.<sup>123</sup>

With the greatest respect, to characterize a burden of proving the truth of a matter by a preponderance of the evidence or on a balance of probabilities as a "burden of adducing evidence" is to confound a quite elemental distinction,<sup>124</sup> and it makes no difference whether one calls the burden "intermediate", "ultimate" or "primordial".

Appleby adduced evidence (testimony) and the evidence raised a reasonable doubt in the trial judge's mind as to whether Appleby had entered the car for the purpose of setting it in motion. If one regards "intention to drive" as an essential ingredient of the offence created by s. 222 of the *Code* (as Ritchie, J., seems to have regarded it),<sup>125</sup> then a reasonable doubt as to this ingredient is a reasonable doubt as to "culpability". If s. 224A(1) (a) provided for conviction on this state of affairs, then according to Mr. Justice Laskin's own formulation of the meaning of s. 2(f) of the *Bill*, there was a clear conflict between the two provisions. But even if "intention to drive" is not regarded as an essential ingredient of the offence created by s.222,<sup>126</sup> since s. 224A(1) (a) *requires* a court to find guilt notwithstanding the presence of a reasonable doubt as to "care or control" (just so long as the accused was found impaired in the driver's seat and does not "establish" a lack of intention to drive), then again, according to Mr. Justice Laskin's formulation of the meaning of s. 2(f) of the *Bill*, s.224A(1) (a) was "offensive" to it.

The final paragraph of the opinion of Laskin, J., which he included by way of observation only, perhaps indicates how he really viewed s.224A(1) (a):

I may observe that what is true of s.224A(1) (a) is also true of the insanity provisions of the *Criminal Code*. The presumption of sanity, expressed in s. 16(4) [now s.16(4), R.S.C. 1970, c. C-34], may be overcome by the accused on a balance of probabilities: see *R. v. Borg*, [1969] 4 C.C.C. 262, 6 D.L.R. (3d) 1, [1969] S.C.R. 551. I note that it has been held by the Supreme Court of the United States that the due process clause of its Constitution is not offended by a state requirement that an accused prove the defence of insanity beyond a

---

<sup>123</sup> [1971] 3 C.C.C. (2d) 354 at 365-6.

<sup>124</sup> See Jayasena, *supra*, note 23.

<sup>125</sup> See *supra*, note 57.

<sup>126</sup> See *Donald*, *supra*, note 57.

reasonable doubt: see *Leland v. Oregon* (1952), 343 U.S. 1970. That is not an issue which arises under our formulation of the law.<sup>127</sup>

Is there any analogy between s. 224A(1) (a) and the defence of insanity? I submit there is not. To view s.224(1) (a) as creating a *defence*, would require viewing it as also altering the nature of the *offence* created by s. 222. One would have to say that the offence of care or control of a vehicle while impaired is not really the offence at all; rather it is *being found in the driver's seat* while impaired which is really the offence — an offence to which one might plead the *defence* of not having entered for the purpose of setting the vehicle in motion. But to say this is surely to destroy the plain structure and wording of the two sections. The offence and its elements are found in s. 222, and a method of proving it is all that is provided by s.224A(1) (a). It would be destructive of the principle of legality to allow a legislature to purport to create an offence in one section and to punish a person, not for having violated *that* section, but for having done something into which, through the use of what for all intents and purposes looks like a procedural section, the first offence has been surreptitiously reconstituted.

But what about defences properly and openly created? Are they to be treated any differently? In other words, is it permissible under the *Canadian Bill of Rights* for Parliament to abandon the somewhat suspect device of a statutory presumption in favour of an offence — defence structure where the new offence is what is now the basic fact and the new defence is the absence of what is now the presumed fact — with the proviso that the defence must be *proved* by a balance of probabilities?

I suppose that the defence of insanity is the best place to start to answer this question as it is the only common law defence for which the persuasive burden is on the accused. For all the others the accused is charged with only an evidential burden which, once discharged, leaves the Crown with a burden of disproof beyond a reasonable doubt.<sup>128</sup>

Laskin, J., cited the case of *Leland v. Oregon* in which the Supreme Court of the United States held that the Due Process clause of the Fourteenth Amendment (applicable to the States) did not prohibit an Oregon statute<sup>129</sup> from imposing on an accused alleging insanity a burden of proving it beyond a reasonable doubt.<sup>130</sup> *Leland*, however, occupies a peculiar temporal position in American constitutional law and in the light of *Winship*<sup>131</sup> is of very doubtful authority for the following reasons.

<sup>127</sup> [1971] 3 C.C.C. (2d) 354 at 366.

<sup>128</sup> See Glanville Williams, *supra*, note 15 at 885-86, 909-910.

<sup>129</sup> Ore. Comp. Laws, 1940, s. 26-929.

<sup>130</sup> Oregon has since lessened this requirement to proof on "a preponderance of the evidence": Ore. Rev. Stat., s. 136-390 (1963); in 1967 half the States imposed this persuasive burden on the accused while the other half imposed only an evidential burden on the accused, leaving it to the prosecution once the issue had been sufficiently raised, to prove sanity beyond a reasonable doubt: Goldstein, *The Insanity Defence* (1967), at 111-12.

<sup>131</sup> *Supra*, note 104.

In the case of *Davis v. United States*<sup>132</sup> an accused charged with murder pleaded insanity as a defence. The trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused, i.e. unless he had proved his sanity on a balance of probabilities or by a preponderance of the evidence. The Supreme Court of the United States reversed the conviction, holding that the value of the presumption of sanity was completely preserved by casting a burden "to produce some evidence"<sup>133</sup> (what we have called an evidential burden) on the accused, thus relieving the prosecution from adducing affirmative evidence of the accused's sanity in every case, but that it would violate the presumption of innocence to convict an accused, unless the prosecution had proved sanity beyond a reasonable doubt once the issue had been raised sufficiently (by the production of "some evidence") to require instruction to the jury. In the words of Mr. Justice Harlan, speaking for the Court:

If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. His guilt cannot be said to have been proved beyond a reasonable doubt — his will and his acts cannot be held to have joined in perpetrating the murder charged — if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?<sup>134</sup>

The Court further stated that the requirement of proof of guilt beyond a reasonable doubt was a principle "fundamental in criminal law, . . . the recognition and enforcement of which [is] . . . demanded by every consideration of humanity and justice."<sup>135</sup>

Nevertheless, when *Leland* came to be decided fifty-seven years later, *Davis* was distinguished on the ground that, being concerned with a federal prosecution, it had not purported to establish a constitutional rule upon the States. In fact the reluctance of the Supreme Court to use the Fourteenth Amendment to impose uniform standards of criminal responsibility on the States had its role to play in *Leland* (*per* Mr. Justice Clark):

. . . choice of a test of legal sanity involves not only scientific knowledge but

---

<sup>132</sup> 160 U.S. 469 (1895).

<sup>133</sup> *Id.*, at 486.

<sup>134</sup> *Id.*, at 488.

<sup>135</sup> *Id.*, at 493.

questions of basic policy as to the extent to which that knowledge should determine criminal responsibility.<sup>136</sup>

Since "due process" had not been specifically in issue in *Davis*, the Court in *Leland* felt free to consider the matter freshly. On investigation, the Court found that in England and in twenty States the accused was required to prove his insanity on a balance of probabilities and felt that the difference between this and proof beyond a reasonable doubt was merely a matter of degree:

While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. Oregon merely requires a heavier burden of proof.<sup>137</sup>

*Tot*<sup>138</sup> was distinguished substantially on the ground that the issue of "elements of the offence" was separate and distinct from "defences".<sup>139</sup>

Notwithstanding all this, eighteen years after *Leland*, in *Winship*, the constitutional standard of proof was described as proof beyond a reasonable doubt of every *fact* — not "element" — necessary to constitute guilt.<sup>140</sup> *Davis* was cited and quoted in support of the constitutional standard of proof beyond a reasonable doubt as was the dissenting opinion of Mr. Justice Frankfurter in *Leland*.<sup>141</sup> While the Court in *Winship* did not directly overrule *Leland*, the case has justifiably been interpreted as having had, in effect, this result.<sup>142</sup>

But American techniques of precedent erosion and circumvention do not concern us here. What is of concern is whether the burden of proof anomaly of the insanity defence is a justifiable anomaly. Certainly the fact that it was meet to the learned judges in *M'Naughten's Case*<sup>143</sup> to so lay down the rule is no reason why we should not re-examine it. As Mr. Justice Holmes once noted, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>144</sup> And what "better reason" have we for imposing a burden of proof on a balance of probabilities on an accused pleading insanity? Any useful purpose of the "presumption of sanity" is served by casting on such an accused the evidential burden that

<sup>136</sup> 343 U.S. 790 (1952) at 801.

This issue, which arises under the American division of jurisdiction over criminal law, but which is obviously not relevant to Canada, can be seen to concern the Supreme Court in other areas of criminal law; see, for example *Powell v. State of Texas* 392 U.S. 514 (1968).

<sup>137</sup> 343 U.S. 790 (1952) at 798.

<sup>138</sup> *Supra*, note 113.

<sup>139</sup> 343 U.S. 790 (1952) at 797.

<sup>140</sup> See *supra*, note 105.

<sup>141</sup> 397 U.S. 358 (1970) at 361-62.

<sup>142</sup> See *United States v. Eichberg*, 439 F2d 620 (D.C. Cir. 1971) at 623-24, *per Bazelon, C.J.*

<sup>143</sup> *Supra*, note 65.

<sup>144</sup> O.W. Holmes, *The Path of Law* (1897), 10 Harv. L. Rev. 457 at 469.

he bears with respect to all other defences.<sup>145</sup> However, once we say that we are willing to convict an accused notwithstanding the presence of a reasonable doubt as to whether he was insane or not at the time he committed the offence, we indicate an ambivalence about the defence of insanity.<sup>146</sup> We are saying, in effect, that an accused who acted out of insanity is "less innocent" than one who acted out of self-defence, because we are evincing a greater concern for protecting those who are "innocent" because of the latter excuse, than those who are "innocent" because of the former.

However, unless "innocence" is to lose all legal and moral meaning, we must be equally cautious of not convicting those who are innocent for any reason. Certainly, s.2(f) of the *Canadian Bill of Rights* makes no distinction between degrees of innocence; and if, as it is submitted, the presumption of innocence is meaningless unless coupled with the reasonable doubt standard, that standard must equally apply to the insanity defence. The only alternative is to stop making pretence and adopt the usage abandoned by the English in 1964, namely a verdict of "guilty but insane"<sup>147</sup> instead of the present "not guilty on account of insanity".

---

<sup>145</sup> In *Davis, supra*, note 132 at 486-7 having held the reasonable doubt standard applicable to the defence of insanity, the Court discussed the "presumption of sanity" as follows:

This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. . . .

. . . In a certain sense it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.

<sup>146</sup> In *The Limits of the Criminal Sanction* (1968), Professor Packer writes at 139: 139:

"Excuses about which we are peculiarly ambivalent, such as the insanity defense, are often left to the defendant to prove. And recognition of a novel defense like mistake of law is only transitionally achieved by allowing the defense to be presented while requiring the defendant to carry the burden of proving it, or by setting a less severe standard than proof beyond a reasonable doubt for the prosecution's negation of the defense. But these devices are compromises with the principle of culpability, compromises that will not endure. The more clearly we see the requirements that the peculiar character of the criminal sanction lays upon us, the less willing we will be to permit this kind of temporizing with basic principle. Recent legislative revisions of the criminal law attest to the predictive truth of this observation."

See also Cross and Jones, *An Introduction to Criminal Law* (1968) at 73.

<sup>147</sup> See the *Criminal Procedure (Insanity) Act*, 1964 (U.K.) s. 1.



The same considerations, of course, are applicable to all excuses and justifications which are recognized by the law. And it should hardly matter whether such excuses or justifications are enacted in the form of "defences", "exceptions", "exemptions", "provisos", "qualifications" or whatever.<sup>148</sup>

For example, it cannot be seriously disputed that an accused is just as innocent of the offence of "without lawful excuse . . . [having] in his possession any instrument for house-breaking"<sup>149</sup> if he possessed such an instrument but had a lawful excuse, as if he possessed no such instrument at all. Yet, as the law stands, if there is a reasonable doubt as to whether or not he possessed such an instrument, he is to be acquitted; if there is no doubt as to possession but a reasonable doubt (only) as to whether or not he had a lawful excuse, he is to be convicted.<sup>150</sup> Is there any justification in principle or in policy for the distinction? Why are we less concerned about protecting the liberty and good name of one "innocent" than we are about the other "innocent"?

The reason, as with many other criminal law anomalies, seems to be largely historical. It was the tendency of the common law judges to decide questions involving the allocation of burdens of proof in criminal cases by analogizing with the rules that prevailed in private law disputes. As Professor Fletcher has written:

The courts required little authority for their decisions; for the results seemed in keeping with an intuitively plausible way to structure criminal litigation. And the plausibility of that system traded on the assimilation of the criminal process to the model set by the litigation of private disputes. It seemed natural, in criminal as well as private cases, that certain issues should be the responsibility of the defendant or his lawyer. The resulting division of the criminal case — into inculpatory and exculpatory issues — called forth incomplete rules of criminal liability: like rules of private law, they were silent on the defensive issues. As a man would be liable in an action on the case for negligently and proximately causing harm to another (no mention of assumption of risk), so would he be liable criminally for intentionally and maliciously killing another human being (no mention of self-defense and insanity).<sup>151</sup>

Borrowing from such maxims of private law as *ei incumbit probatio qui dicit; non qui negat*<sup>152</sup> and *reus excipiendo fit actor*,<sup>153</sup> maxims which stretched back to the great logical system of Roman law, the criminal law came to regard matters of exception generally as "appropriate" for the accused to prove, whether found within or without these "incomplete rules". The ten-

<sup>148</sup> The list is derived from s. 730 of the *Criminal Code* where the "burden of proving" that such matters operate in the defendant's favour is placed on him, with respect to summary conviction offences. For the history of the section, see Levy, *supra*, note 28 at 45, n. 24.

<sup>149</sup> S. 309(1) of the *Criminal Code*, quoted *supra*, note 8.

<sup>150</sup> See remarks of Hall, J., as to the dangers involved in this state of affairs in *Tupper v. The Queen* [1968] 1 C.C.C. 253 at 257-58.

<sup>151</sup> Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases* (1968), 77 Yale L.J. 880 at 907. The following discussion draws heavily on this superb article.

<sup>152</sup> "The proof lies upon him who affirms, not upon him who denies."

<sup>153</sup> "The defendant, by excepting or pleading, becomes a plaintiff."

dency, as we have seen, has largely ended with respect to the "common law defences"<sup>154</sup> (save for that of insanity), but much is still made, for purposes of allocating persuasive burdens of the distinctions between positive and negative "averments", "elements" and "exceptions", etc.<sup>155</sup>

The issue arises in our possession of house-breaking instruments without lawful excuse example in the following way. The accused could have any one of a multitude of lawful excuses for being in possession of a house-breaking instrument. If he does have one, though, it is very probable that he knows what it is or at least can point to it. On the other hand, for the Crown to make out a *prima facie* case by adducing evidence on the absence of all possible lawful excuses, let alone to prove their absence beyond a reasonable doubt, would be exceedingly difficult if not impossible. The common law judges solved this dilemma by reaching into private law for the rule that "if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative".<sup>156</sup> Of course, the rule, being of private law origin, did not distinguish between the persuasive and evidential burdens (essentially a recent criminal law distinction), nor was it necessary to make this distinction given the fact that the characteristic situation in which the question arose was a submission by the accused that the Crown had failed to make out a *prima facie* case.<sup>157</sup> Further-

<sup>154</sup> Eg. self-defence, necessity, duress.

<sup>155</sup> The following is a breakdown into what might be called "traditional" categories of the instances in the *Criminal Code* in which a persuasive burden of proof (on a balance of probabilities) is placed on the accused, thus providing for conviction notwithstanding a reasonable doubt as to guilt or innocence:

(1) negative averments peculiarly within the knowledge of the accused ("without lawful excuse, the proof of which lies upon him" etc.): ss. 58(3); 80; 102(3); 106(1); 114(C); 133(1) (b), (2), (3), (4), (5); 173; 197(2); 247(2); 258(a); 307(1); 309(1); 310; 327; 334(b), (c); 341(2); 363; 375(1) (a), (2); 377; 396; 408; 409; 410; 416; 417; 457.2(2).

(2) exceptions found outside the enacting clause, or "defences" ("No accused shall be convicted of an offence under section ... where he proves that ..." etc.): ss. 139(2); 159(3); 243(2); 247(3); 253(2); 275; 280(2); 281.2(3); 360(2); 367(2); 378(2); 386(2); 415(3).

(3) positive averments or "elements" in which the burden is cast on the accused through the use of persuasive presumptions ("he shall be deemed ... unless he establishes that ..." etc.): ss. 16(4); 193(4); 237(1) (a); 254(4); 267(1); 320(4) (*semble*); 450(3); 452(3); 453(3); 454(4).

(4) exceptions found within the enacting clause ("unless he establishes that ..." etc.): ss. 50(1) (a); 94; 110(1) (b), (c); 352(1) (c).

(5) positive averments or "elements" in which the burden is cast on the accused without the use of persuasive presumptions: ss. 139(3); 179(3); 299(5).

(6) general section casting persuasive burden on accused with respect to all exceptions in summary conviction matters: s. 730(2).

<sup>156</sup> *R. v. Turner* (1816), 5 M. & S. 206 at 211; 105 E.R. 1026 at 1028, *per* Bayley, J.

<sup>157</sup> See *R. v. Scott* (1921), 85 J.P. 69; *R. v. Oliver*, [1944] K.R. 68 (C.C.A.); *R. v. Ewens*, [1967] 1 Q.B. 322 (C.C.A.).

In each of these cases, as in *Turner*, the only question was whether the prosecution had made out a *prima facie* case without having adduced evidence on the element negatively averred. But in each there is *dicta* indicating that the persuasive burden also shifts.

more, it is abundantly clear that the dilemma could have been, and still can be, solved for all purposes by imposing on an accused merely the same evidential burden he presently bears with respect to such defences as self-defence. In order to avoid foreclosure of the issue of "lawful excuse" against him,<sup>158</sup> he would have to point to "some evidence" upon which a reasonable doubt as to whether or not he had a lawful excuse could be properly founded. The Crown would thus be relieved of making out a *prima facie* case on the issue of lawful excuse until the accused discharged his evidential burden with respect to that issue. Naturally, the adduction of evidence by the accused would narrow down the infinite number of possible excuses to the particular one upon which he was relying. To prove the absence of this particular lawful excuse beyond a reasonable doubt would be no more difficult for the Crown than the satisfaction of the same requirement with respect to "elements" and "defences" generally.<sup>159</sup>

There seems, therefore, no justification in policy (unless the policy is that of giving less protection to one kind of "innocent" than to another) or in principle (unless the principle is that of maintaining a pleasing consistency between criminal and private law procedure) for Parliament's habit, in this type of case, of shifting the persuasive burden as well as the evidential burden to the accused. There is *never* such justification in *any* type of case.<sup>160</sup> A shift in the evidential burden only would always be sufficient, as well as being the only kind of shift consistent with the desiderata of the reasonable doubt standard, the presumption of innocence and due process of law.<sup>161</sup>

*Postscript: "The Americans Are Coming!"*

In the course of this discussion, the reader has no doubt noted (perhaps with some unease) a thoroughly un-Canadian emphasis on American authori-

<sup>158</sup> Whether the issue should be foreclosed against the accused, or whether a failure on the accused's part to discharge his evidential burden should merely authorize the court to find against him is a question that really only arises in a jury trial. The question is whether it is desirable for the judge in some circumstances to be able to remove the issue from the jury's consideration, or whether the jury should always have the opportunity to consider it. It is a matter of jury control.

<sup>159</sup> See Glanville Williams, *supra*, note 15 at 901-905 to the same effect.

<sup>160</sup> Strangely enough, Professor Levy, who is sensitive to the private law origins of the confusion in this area and (presumably) to the totally disparate policy purposes of allocations of burdens of persuasion in private law and criminal law, is nevertheless of the opinion that the *Canadian Bill of Rights* "still allows negative averments and matters arising by way of confession and avoidance, other than affirmative defences at common law, to be the objects of a reverse onus clause casting the civil burden on the accused": Levy, *supra*, note 28 at 58. The only policy justifications he can offer, however, are the ones just discussed which we have shown are satisfied by a shift in the evidential burden only. (see p. 62). See also the distinction made on this ground by Tysoe, J.A., in *R. v. Silk*, [1970] 3 C.C.C. 1 at 7-8 and 13-15.

<sup>161</sup> This is not, of course, to say that a shift in the evidential burden would *always* be consistent with these principles, even with respect to matters of "exception". There will always be a question as to whether a shift in the evidential burden is legitimate and the answer will involve not only considerations of the presumption of innocence, but also of "self-crimination" and "probable cause". My thesis is simply that it is only with respect to a shift in the evidential burden that a legitimate question can ever arise. A shift in the persuasive burden, *because it allows conviction when there is a reasonable doubt of guilt* is never legitimate.

ties to aid in the interpretation of a Canadian statute. I have not, of course, intended to suggest that our judges should be bound by American decisions nor even that they should recognize them as "authoritative" in any strict legal sense. What I am suggesting is simply that in using a phrase such as "due process of law" in the context of a "Bill of Rights" enacted in 1960, in full knowledge of the treatment being given that phrase, by then peculiar to American courts, Parliament was saying something quite explicit to our judges. At the very least, it was telling them to exercise the same sort of careful watchfulness over federal legislation as the American judges in administering their Bill of Rights exercise over American legislation. As Mr. Justice Rand has eloquently written of the due process clause in the *Canadian Bill of Rights*:

Why not, then, leave the question of what is fair and acceptable to the determination of legislatures? Whatever the answer to this, the legislature, by its own declaration, has placed the duty on the courts which they must accept; and by doing so, it has recognized that on occasion legislation does not always restrain its action within the limits of due process. It has accepted the view that under the conditions in which laws are enacted in our parliamentary system there may be lapses from those appreciations of inarticulate interests with which the function of courts is specifically and uniquely charged; that a detached and objective examination in an atmosphere from which certainly a wider range of irrelevance is excluded than in a legislature will probably be able to pronounce a sounder judgment than that of public debate. Parliament in fact has expressed its opinion to that effect in conditioning legislation by due process; and it has presented to judicial tribunals for the first time an opportunity to elaborate a Canadian jurisprudence within the perspective of the national ethos of a modern western state.<sup>162</sup>

The task thus assigned is doubtless a difficult one. But in packing the *Canadian Bill of Rights* with phrases which, though necessarily vague and imprecise, have been the object of almost two hundred years of passionate debate among the very learned and vigorous members of the American legal profession, Parliament intended to give our courts a good deal of aid. It is now for our courts and our lawyers to make use of the tool thus provided, by reading what has been written, listening to what has been said, and watching what has been happening around and about the words in the American Bill of Rights.

There is, of course, the further happy aspect that our Bill of Rights is free of many of the more obvious pitfalls of its American counterpart. While an American contemplating the activities of his Supreme Court might become "convinced that his welfare and liberty were ultimately at the mercy of a self-conceived super-legislature instead of a court of law,"<sup>163</sup> and might denounce the Court as an undemocratic straightjacket on the general will as expressed in legislation, given the fact that unrestrained judicial elaboration of the American Bill of Rights may well have far outstripped the modest intentions of the framers of that ancient document and given the near impossibility of changing its now sacred words,<sup>164</sup> a Canadian could make no such

---

<sup>162</sup> Rand, *supra*, note 80 at 190.

<sup>163</sup> Bischoff, "The Role of Official Precedents", in Cahn, *Supreme Court and Supreme Law* (1954) at 78.

<sup>164</sup> For a careful examination of some current arguments against judicial review of American legislation under the Constitution, see Berger, *Congress v. The Supreme Court* (1969) at 154-197.

complaints, should the Supreme Court of Canada start applying the *Canadian Bill of Rights*. For notwithstanding any violence the American courts may be said to have done, at least in approach, to the intentions of the framers of the American Bill of Rights, Parliament was fully aware of this when it enacted ours in 1960, and using the type of language it used, it obviously desired that approach. The only way our courts could now be said to set themselves up above the legislature is to refuse its clear direction to adopt that approach. As an American judge once put it, "the demolition of the purpose of Congress, through stingy interpretation, is the most emphatic kind of judicial legislation".<sup>165</sup>

Furthermore, a decision by the Supreme Court of Canada under the *Canadian Bill of Rights* which is adverse to a federal legislative effort is not, as it may be in the United States, the end of the matter. It is not that the *Bill* is easy to amend — politically that may be a very difficult thing to do. Rather, Parliament has provided itself with a safety valve (indeed, it could not be otherwise with a non-constitutional Bill of Rights). If it decides,

---

<sup>165</sup> Judge Frank, dissenting in *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F. 2d 949 (1942) at 967.

It is curious, therefore, to hear apologists of the Supreme Court of Canada's treatment of the *Canadian Bill of Rights* say things such as "... it is useless to expect Canadian courts to fashion any viable civil liberties jurisprudence at the present time. *Concepts of Legislature Supremacy* ... will continue to plague this area of the law". (emphasis added): Barton, *The Power of the Crown to Proceed by Indictment or Summary Conviction* (1971), 14 Crim. L.Q. 86 at 101. Reference should here be made to the case of *R. v. Nevin*, *R. v. De Poe* (1971), 16 C.R.N.S. 315 (Ont. C.A.) in which the argument that the deprivation of trial by jury in s. 467 (now 483) of the *Criminal Code* where the offence charged was an indictable offence, conflicted with the due process clause in s.1(a) of the *Canadian Bill of Rights* was rejected and leave to appeal to the Supreme Court of Canada was refused without written reasons (Feb. 1, 1971).

The Court distinguished *Duncan v. Louisiana* (1968), 391 U.S. 145, which had held that the Due Process clause of the Fourteenth Amendment gave an accused a right to a jury trial with respect to all but petty offences, on the correct ground that the basis of that holding was not the Due Process clause of the Fifth Amendment (from which derives the reasonable doubt standard and the presumption of innocence) but rather the specific guarantee of trial by jury "in all criminal prosecutions" in the Sixth Amendment. However, instead of then proceeding to a discussion of the policy considerations involved (which it mentioned only incidentally) the Court declared that the *Canadian Bill of Rights* was "simply another statute" and as such had to be construed as of the date of its passage. Since, when the *Bill* was passed, the denial of trial by jury in certain cases was part of our administration of justice, reasoned the Court, it had to be taken as "recognized" as being included in "due process of law".

Besides the fact that it might become increasingly difficult and ludicrous in future years to refer back to the magic date of August 10, 1960 to discover the state of the law, this was a position clearly rejected in *Drybones* where the impugned provision of the *Indian Act* was similarly argued to have been included in what was meant as "equality before the law" in 1960. More important, for our purposes, is the justification given by the Court of Appeal for its mechanistic approach to the *Bill*. After discussing the *Duncan* case, it said (*per* Jessup, J.A., at p. 320): "Moreover, the Court was there construing a constitutional document where broad principles of construction affected by policy may be permissible, and the Court was discharging a quasi-legislative function permitted to it but denied to this Court."

Denied by whom? Certainly not by Parliament. And which is more "legislative"—compliance or non-compliance with an obvious Parliamentary command?

after the careful consideration one would expect in matters such as these, that it desires to maintain a provision which the Supreme Court has declared is rendered inoperative by the *Bill*, it can do so by declaring that "this provision shall operate notwithstanding the *Canadian Bill of Rights*". The important thing is that Parliament has recognized and declared certain "human rights and fundamental freedoms" to exist in Canada and it has entrusted to the courts the duty of making it honour that statement. Any departures must be specially justified and then honestly and prominently marked as such. Otherwise the *Canadian Bill of Rights* is less than pious platitude. It is pious hypocrisy.

It has been suggested that it is unfair to burden our judges with such a "policy" oriented task as is involved in the administration of a Bill of Rights, educated as they are said to be in "the traditions of positivism."<sup>166</sup> By "positivism" is meant, I suppose, a mechanistic or mechanical jurisprudence of neat rules and categories. I doubt whether anybody really believe that such rules or categories are anywhere to be found — certainly they aren't to be found in a common law jurisdiction. Judges are legislating (consciously or unconsciously) all the time.<sup>167</sup> A Bill of Rights just forces them to think about it more carefully and openly. It liberates them from having to disguise a crucial issue such as the burden of proof in criminal cases by dressing it up in some illusive category of private law pleading semantics, and allows them to consider it as it exists in reality, in the context of the whole administration of criminal justice.<sup>168</sup>

Perhaps the final argument that could be offered against this "activist" approach to the *Canadian Bill of Rights* that I am advocating, is that, in these days of fervent cultural nationalism, it smacks of "Americanization". This is on the same level of ludicrousness as the Nazis' rejection of Einsteinian physics as "Jewish physics."<sup>169</sup> It is, of course, the mark of the wise man that he can discriminate clearly enough to select what is worthwhile and reject what is not from any given package. We have many more alternatives than either wholly accepting or wholly rejecting American jurisprudence in this area. We need neither follow judiciously behind the Americans<sup>170</sup> nor try to keep pace with them nor try to outrace them. If we are wise, we need only listen to what they have to say.

---

<sup>166</sup> The suggestion is made in Sinclair, *The Queen v. Drybones: The Supreme Court of Canada and The Canadian Bill of Rights* (1970), 8 Osgoode Hall L.J. 599 at 608.

<sup>167</sup> See Stone, *Legal System and Lawyers' Reasonings* (1964) at 229-300; also Montrose, *Precedent in English Law* (1968) at 100-101.

<sup>168</sup> See, for example, the discussion of the function of the reasonable doubt standard by Mr. Justice Brennan in *Winship*, *supra*, note 107.

<sup>169</sup> See Shirer, *The Rise and Fall of the Third Reich* (1960) at 251.

<sup>170</sup> For example, the Supreme Court of Canada in *Drybones* skipped over the fifty-seven year period in American constitutional history between *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education*, 347 U.S. 483 (1953), during which the "separate but equal" doctrine had had currency. It was through reference to the American experience that the Court could recognize the functionally bankrupt nature of this interpretation of "equality before the law" which had been given by Tysoe, J.A., in *Gonzales*, *supra* n. 73; see the opinion of Hall, J., in *The Queen v. Drybones*, [1970] S.C.R. 282 at 299.